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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,

Petitioners,

v.

NOAH C. A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,

and

MARY JONES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NOAH C. A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
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and

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Intercounty Construction Corp., and Hartford Accident & Indemnity Company, pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 16, 1975.

OPINIONS BELOW

The order of the Court of Appeals, not reported, appears in the appendix hereto (App. 53).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under 28 U.S.C. §1291. Its judgment was entered on January 16, 1975, and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Is the award of attorney's fees against an employer and its workmen's compensation carrier pursuant to November 26, 1972, amendments of the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia, proper or constitutionally permissible where the workman sustained his industrial injury on July 19, 1960, before the effective date of said amendments?

STATUTES INVOLVED

United States Code, Title 33:

§928. Fees for Services.

(a) No claim for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall be valid unless approved by the deputy commissioner, or if proceedings for review of the order of the deputy commissioner in respect of such claim or

award are had before any court, unless approved by such court. Any claim so approved shall, in the manner and to the extent fixed by the deputy commissioner or such court, be a lien upon such compensation.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the deputy commissioner or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof, shall, for each offense, be punished by a fine of not more than $1,000 or by imprisonment not to exceed one year, or by both such fine and imprisonment.
Mar. 4, 1927, c. 509 §28, 44 Stat. 1438.

§928. *Fees for services–Attorney's fee; successful prosecution of claim.*

(a) If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board or court, as the case

may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

Attorneys' fee, successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments.

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to sections 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation

by physicians employed or selected by the Secretary as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services ahall not be assessed against the employer or carrier.

Approval; payment; lien

(c) In all cases fees for attorney's representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

Costs; witnesses' fees and mileage; prohibition against diminution of compensation to claimant.

(d) In cases where an attorney's fee is awarded an employer or carrier, there may be further assessed against such employer or carrier as costs, fees and

mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witnesses and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

Unapproved fees; solicitation; penalty

(e) Any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the deputy commissioner, Board or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.
As amended Oct. 27, 1972, Publ L. 92-576, §13, 86 Stat. 1259.

District of Columbia Code:

§36-501. *Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.*

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of

the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, §1.)

Effective Date

Section 3 of the Act of May 17, 1928, provided that: "This Act [adding this section and section 36-502] shall take effect July 1, 1928."

U.S. Const. Art. I, Sec. 10.–No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, expost facto law, or impairing the obligation of contracts, or grant any title of nobility.

U.S. Const. Amend. 5. Criminal actions–Provisions concerning–Due Process of law and just compensation clauses– No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compleled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 14. All persons born or naturalized in the United States, and subject to the jurisdicton thereof, are citizens of the United States and of the State herein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 19, 1960, Charles E. Jones (hereinafter claimant or employee) was injured in the District of Columbia while working for Intercounty Construction Corporation (hereinafter employer) and on August 12, 1960, he filed a claim under the District of Columbia Workmen's Compensation Act, for workmen's compensation benefits, alleging permanent disability for said accident. (App. 1-12) Hartford Accident & Indemnity Company, the workmen's compensation carrier for Intercounty (hereinafter carrier) voluntarily paid workmen's compensation benefits until January 23, 1968, when the then applicable statutory maximum of $17,280 under the District of Columbia Workmen's Compensation Act had been reached, except for permanent and total disability cases. (App. 1-12) More than a year later, on February 11, 1970, attorney Jefferson de R. Capps requested a hearing for compensation on a permanent total disability basis. (App. 1-12)

Hearings were held on December 21, 1970, and January 14, 1971, and on May 24, 1971, respondent Noah C.A.

Walter, Deputy Commissioner for the United States Department of Labor, Bureau of Employees' Compensation, District of Columbia Compensation District, rendered a compensation order rejecting the claim of Charles E. Jones on the basis that more than one year had elapsed between the date of last compensation payment and the new claim for permanent total disability. (App. 1-12)

Suit was then filed by the employee to set aside the rejection of his claim in the U.S. District Court for the District of Columbia, pursuant to 33 U.S.C. §921. (App. 1-12) Counsel for the claimant and the defendant Deputy Commissioner eventually presented a consent order of remand to the court (the employer and carrier not being a party to the action) and the case was then sent back to the Deputy Commissioner for a further consideration on the merits. (App. 1-12) Pursuant to said remand, the Deputy Commissioner, on February 8, 1972, made an award of permanent and total disability to the claimant (App. 1-12)

Suit was then instituted by the employer and carrier, petitioners herein, in the U.S. District Court for the District of Columbia on February 17, 1972, to set aside the Deputy Commissioner's second award, and an answer was filed on his behalf on February 25, 1972. On October 11, 1972, the employer and carrier filed its motion for summary judgment, and on November 20, 1972, the Deputy Commissioner filed his cross-motion for summary judgment. (App. 1-12)

On February 15, 1973, U.S. District Court Judge Aubrey E. Robinson, Jr., granted the employer and carrier's motion for summary judgment, ruling that the one-year statute of limitations in §22 of the Longshoremen's Act barred the employee's claim for additional compensation. An appeal

was noted by the Deputy Commissioner on April 10, 1973, and on July 3, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the lower court judge and remanded the case back to him for further proceedings. (App. 1-12)

On August 14, 1974, counsel for Mary Jones, as guardian for the claimant, Charles E. Jones, who had been permitted to intervene in the Court of Appeals proceedings, moved the United States Court of Appeals, pursuant to the provisions of U.S.C. §928(a), as amended, for an award of attorney's fees for services rendered on behalf of the claimant in the Court of Appeals. On August 26, 1974, the employer and carrier filed its opposition to the intervenor's motion for attorney's fees, alleging, among other things, that §28 of Longshoremen's and Harbor Workers' Act, which was amended on October 27, 1972, effective as of November 26, 1972, as applied to a pre-amendment injury, was unconstitutional in that it violated the impairment of contract provisions of the United States Constitution as found in Article I, §10, Clause 1, and the provisions of the Fifth Amendment to the United States Constitution, protecting vested rights. It was also urged that the amendments to the Act should be given prospective application only. (App. 13-43)

On August 30, 1974, the United States Court of Appeals ordered counsel for the intervenor to submit a detailed statement of services rendered, which was done on September 13, 1974. (App. 44-52)

On September 30, 1974, the employer and carrier petitioned this Honorable Court for the issuance of a Writ of Certiorari which was granted on January 20, 1975. On January 16, 1975, the United States Court of Appeals,

per curiam, entered an order awarding counsel for the intervenor attorney's fees in the amount of $750.00 (App. 53)

REASONS FOR GRANTING WRIT

I. TO RESOLVE CONFLICT BETWEEN FEDERAL COURT OF APPEALS AND APPLICABLE DECISIONS OF SUPREME COURT AS APPLIED BY NUMEROUS STATE COURTS OF APPEALS AND LOWER FEDERAL COURT.

The abbreviated opinion of the U.S. Court of Appeals for the District of Columbia, although presented with arguments challenging an award of attorneys fees under the amended Longshoremen's Act as being violative of the impairment of contract provisions of Art. I, sec. 10, of the U.S. Constitution, the vested rights provisions of the Fifth Amendment, and general principles of retroactivity, simply awarded counsel fees for $750 without discussion of the issues framed.

The result reached is directly in conflict with numerous decisions of state courts of appeals under state compensation statutes which, relying on Supreme Court decisions and the Federal Constitution, held that increases of substantial monetary benefits created after the date of injury violated Art. I, sec. 10 of the U.S. Constitution, if applied retroactively. In *Hardware Mut. Casualty Co. v. Carlton*, 151 Fla. 238, 9 So.2d 359 (1942), the Supreme Court of Florida, *en banc*, relying in part on *Liberato v. Royer*, 720 U.S. 535 (1926) noted that acceptance of the state workman's compensation statute by the employer, employee, and insurance carrier constituted a contract between the parties embracing the provisions of the statutes as they

existed at the time the compensable injury occurred. Since the post-accident amendments awarding attorneys fees were not a part of that contract, any attempt to retroactively apply same was contrary to Art. I, sec. 10 of the U.S. Constitution.

This same rationale was followed in *Phillips v. City of West Palm Beach*, (Fla. S.Ct.), 70 So.2d 345 (1954) where the applicable benefits for a scheduled loss (foot) were held to be those in existence at the time of injury and not those in effect when the disability occurred. Also see *Hyatt v. Armstrong Cork Co.*, (Fla. S.Ct.), 121 So.2d 793 (1960) and *Hecht v. Parkinson*, (Fla. S.Ct.), 70 So.2d 505 (1954).

In *Preveslin v. Derby & Ansonia Developing Co.*, 112 Conn. 129, 151 A. 518 (1930), the court held that an attempt to retroactively apply increased benefits violated the impairment of contract provisions of Art. I, sec. 10 of the U.S. Constitution and the vested rights protection of the Fourteenth Amendment.

Similar holdings may be found on one or both bases in *Warner v. Zaiser*, 184 Minn. 598, 239 N.W. 761 (1931); *Yaeger v. Delano Granite Works*, 250 Minn. 303, 84 N.W. 2d 363 (1957); *Salmon v. Denhart Elevators*, 72 S.D. 110, 30 N.W.2d 644 (1948); *Gauthier v. Penobscot Chemical Fiber Co.*, 120 Me. 73, 113 A.28 (1921); *In re Beausoleil's Case*, 321 Mass. 344, 73 N.E.2d 461 (1947); *McClung v. Nat. Carbon Co.*, 190 Tenn. 202, 228 S.W.2d 488 (1950); *State ex rel. Conley v. Pennybacker*, 131 W.Va. 442, 48 S.E.2d 9 (1948); *Washabaugh v. Bartlett Collins Glass Co.*, 177 Okla. 159, 57 P.2d 1162 (1936); *Swatek Const. Co. v. Williams*, 177 Okla. 305, P.2d 585 (1935); *Thomas v. Crummies Creek Coal Co.*, 297 Ky. 210, 179 S.W.2d

882 (1944); *General Refractories Co. v. Henderson*, 313 Ky. 613, 232 S.W.2d 846 (1950). An extended discussion and analysis coming to the same result is found in *Tennessee Coal & Iron Div., U.S. Steel Corp. v. Hubbert* (Ala. S.Ct.), 110 So.2d 260 (1959), which relied in part on *P.J. Carlin Construction Co. v. Heaney*, 299 U.S. 41 (1936).

A lower federal court judge in the Fifth Circuit observed in *Mitchell v. U.S. F&G Co.*, 206 F. Supp. 489 (D.C. Tenn., 1962),

> "the right of an injured employee to compensation benefits arises from his contractual relationship with his employer existing at the *time* of his injury, and the statute *then* in force forms a part of the contract and determines the substantive rights and obligations of the parties, 58 Am Jur 599, Workmen's Compensation, Sec. 33; 82 A.L.R. 1244. To the extent that Workmen's Compensation statutes do form a part of the contractual relationship between an employee and his employer, the Constitution of the United States prohibits the enacting states from impairing the obligation of such contracts – Cf. *Phillips v. City of West Palm Beach* (Fla. S.Ct.), 70 So. 2d 345 (1953); *Salmon v. Denhart Elevators*, 72 S.D. 110, 30 N.W.2d 644 (1948)."

Although the foregoing decisions involve Art. I, sec. 10, of the U.S. Constitution and the Fourteenth Amendment, there is respectable authority suggesting that the Fifth Amendment to the U.S. Constitution provides a measure of protection against contract impairment where the Federal Government is involved. *John McShain, Inc. v. District of Columbia*, 92 U.S. App. D.C. 358, 205 F.2d 882 (1953);

Johnson v. United States, 111 Ct. Cl. 750, 79 F. Supp. 208, 211 (1948); *Miller v. Howe Sound Min. Co.*, 77 F. Supp. 540 (D.C. Wash., 1948); *Trozze v. Drooney*, 232 N.Y.S. 2d 139, 35 Misc. 2d 1060 (1962); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960).

It has also been held that the Fifth Amendment to the United States Constitution protects vested rights and that such vested rights cannot be destroyed, divested or impaired by direct congressional legislation. *Deutsche Bank Und Discoto-Gesellschaft v. Cummings*, 65 App. D.C. 296, 83 F.2d 554 (1936). Quoting Justice Field on vested rights in the case of *Pacific Mail S.S. Company v. Joliffe*, 2 Wall. 450, 457, 17 L.Ed. 805 (1864), the court stated, at p. 559:

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Noted in the course of the opinion was the case of *Ettor v. City of Tacoma*, 228 U.S. 148 (1913), which by analogy appears to present the converse of the situation existing in this case. There the State of Washington enacted a statute which allowed abutting property owners to recover compensation for consequential damages arising out of a street grading made under municipal direction. After the Plaintiff had sustained the type of damage contemplated by the statute, the law was repealed. The Supreme Court held that the repealing legislation deprived the plaintiff of a right which had vested and, as such, was

a vested property right which could not be defeated by subsequent legislation. The right to workmen's compensation benefits under the Longshoremen's Act has been held to be a property right. *Maryland Casualty Company v. Lawson*, 110 F.2d 269, 270 (5th Cir. 1940).

Petitioners respectfully suggest that the result reached in the instant case, albeit without any discussion of the specific points raised, directly conflicts with the applicable Supreme Court precedents standing alone and as applied by various state supreme courts and lower federal courts, and these diverse holdings should be resolved. The fact that state compensation statutes were involved in the previously cited authorities does not detract from the constitutional principles involved simply because the present decision involves Congressional rather than state legislation since the Fifth Amendment appears to furnish the same protection as that which inhibits the states.

II. TO INSURE PROPER ADMINISTRATION OF LONGSHOREMEN'S ACT.

The impact of this conflict is not narrowly confined but extends to many cases which are pending before the Benefits Review Board and Court of Appeals. Counsel for petitioners herein, for example, has two other cases presently pending before the U.S. Court of Appeals and one before the Benefits Review Board, involving the same issue of attorneys fees. Two recent Federal appellate decisions, although distinguishable because the constitutional issues were not directly raised or because the pronouncement could be considered as *dictum* indicate that the attorneys fee issue is an on-going one. See *Overseas African Construction Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974), and *Dillingham Corporation v. Massey*, 505 F.2d 1126 (9th Cir. 1974).

In addition, by virtue of Benefits Review Board decisions commencing with *Virginia Hotel Co. v. Mills,* BRB No. 133-73 (1974) (App. 54-63), the administrative law judges who hear contested cases have been uniformly awarding attorneys fees where the claimant prevails for legal services rendered after November 26, 1972, regardless of when the employee was injured. It can be stated without exaggeration that there are still many cases pending yet to be tried where the injury arose before the effective date of the amendments. Furthermore, should this Honorable Court adopt the reasoning of the U.S. Court of Appeals for the District of Columbia Circuit promulgated in this case as to the sec. 22 statute of limitations issue, then cases previously considered as closed could be revived, and the question of attorneys fees presented herein would recur.

III. TO DECIDE AN IMPORTANT FEDERAL QUESTION.

In line with the prior discussion, petitioners suggest that the recent amendments to the Longshoremen's Act present an important federal question on awarding attorneys fees for a pre-amendment injury which should be decided so that the statute can be properly administered. This Honorable Court has noted in many instances that retroactive application of legislation is not favored except upon the clearest mandate. *Claridge Apartment Co. v. Commission of Internal Revenue,* 323 U.S. 141 (1944); *Greene v. United States,* 376 U.S. 149 (1964). The result reached here in awarding attorneys fees by retroactively applying the 1972 Longshoremen's amendments to pre-amendment injuries appears to be contrary to the foregoing principle.

Although the specific issue on attorneys fees revolves around sec. 28 of the Act, other amendments enacted at the same time in sec. 5 voided indemnity agreements between

the injured longshoreman's employer and the vessel in third party actions. The question arose, naturally, as to whether these amendments applied to an injury occurring or an indemnity contract in effect prior thereto.

In the case of *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974), the court considered whether the indemnity amendments to the Longshoremen's Act, effective November 26, 1972, were to be given prospective or retrospective application. The court traced the legislative history and expressions of congressional intent and concluded that the amendments should be given prospective application only. The court emphasized that the critical date was the date of the longshoremen's injury. It was then that his rights vested against the shipowner and then that the shipowner's rights vested against the stevedore. Although the third party complaint seeking indemnity was filed after the 1972 amendments were effective, the parties' rights were considered as having been fixed in July of 1972 when the claimant was injured.

A similar approach was adopted in the case of *Bell v. Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla 1073). In the course of his opinion at page 159, the District Court Judge stated:

> "Further evidence of Congressional intent that the section be applied prospectively is the fact that the amendments also improved the benefit structure of he Act. The maximum benefit amounts were increased, along with other changes in calculations of benefits and survivor benefits. . . ."

The report from the House of Representatives, Report No. 92-1441, 92nd Cong. 2d Sess. (1972) which accompained the proposed 1972 amendments of the Longshoremen's

Act, began the explanation of the purpose and background of the amendments, as follows:

> "Amendments to Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70.00 a week. Today, the average longshoreman's or ship repairman's wage is over $200.00 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law, a substantial increase in benefits is needed . . . " (118 Congressional Record, page 4698-4699)

If the foregoing authorities are correct in determining that the critical date for the vesting of rights and responsibilities was the date of injury for purposes of a third party action and indemnity contracts and that the amendments should be given prospective application only, then it would appear that the same rationale should pertain so as to preclude awarding attorneys fees for a pre-amendment injury.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

INTERCOUNTY CONSTRUCTION CORPORATION
HARTFORD ACCIDENT & INDEMNITY COMPANY

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER,
U.S. DEPARTMENT OF LABOR, BUREAU OF
EMPLOYEES COMPENSATION, APPELLANTS

MARY JONES, INTERVENOR

Appeal from the United States District Court
for the District of Columbia

Judgment entered this date ←

Decided July 3, 1974

Leavenworth Colby, Attorney, U.S. Department of Labor with whom *George M. Lilly*, Attorney, United States Department of Labor was on the brief, for appellant. *Harold H. Titus, Jr.*, United States Attorney

at the time the record was filed and *Ellen Lee Park*, Assistant United States Attorney also entered appearances for appellant.

John C. Duncan, III, for appellees.

Maurice C. Goodpasture was on the brief for intervenor.

Before: LEVENTHAL and ROBB, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *District Judge* SOLOMON.

SOLOMON, *District Judge*: The issue presented in this appeal is whether an injured workman who filed a timely compensation claim and whose employer paid compensation without awaiting an award is barred by Section 22 of the Longshoremen's and Harborworkers' Act (Act), 33 U.S.C. § 922, from seeking additional compensation because he did not file a second claim within one year after his employer stopped paying compensation.

Charles E. Jones (claimant) was injured on July 19, 1960, while working for Intercounty Construction Corporation (employer) in the District of Columbia. On August 12, 1960, he filed a claim for permanent disability under the District of Columbia Compensation Act, 45 Stat. 600, 36 D.C. Code 36-501, with the deputy commissioner of the Bureau of Employee Compensation of the Department of Labor.[1] The claim was filed within

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The District of Columbia Compensation Act incorporates by reference the Longshoremen's and Harborworkers' Act, 33 U.S.C. §§ 901 *et seq.*, as amended. The deputy commissioners of the Bureau of Employee Compensation of the Department of Labor administer both acts.

the period permitted by Section 13 of the Act.[2] The employer's insurance carrier, Hartford Accident & Indemnity Company (carrier), filed an answer on August 25, 1960, admitting that claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in his claim. The carrier[3] also filed a notice that it had started to pay compensation without awaiting an award by the deputy commissioner, a procedure required by Section 14(a)[4] of the Act when liability is not controverted. The claimant was paid $54.00 per week, the amount payable for total disability.

On January 6, 1965, the carrier filed a notice that it was controverting Jones' claim on the grounds of wages, extent of disability, and unauthorized medical care. On April 27, 1965, the carrier informed the deputy commissioner that it was reducing claimant's compensation to $27.00 per week, the rate for 50 per cent temporary

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[2] Section 13(a) provides:

TIME FOR FILING OF CLAIMS

Sec. 13. (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment.

[3] The term "carrier" shall include "employer" because in this case the interests of the carrier and the employer are identical.

[4] Section 14(a) provides:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

partial disability.[3] On June 1, 1965, the deputy commissioner notified the claimant that if he wanted to contest the reduction in payments he should see an attorney. On August 26, 1966, a claims examiner held a hearing at which claimant was present. The conference was adjourned without any recommendation on claimant's renewed claim for total disability benefits.

On January 23, 1968, the carrier stopped paying compensation because it had paid claimant $17,280.00, its maximum liability for any condition other than total permanent disability. On February 11, 1970, claimant requested a hearing on his claim for total permanent disability. Hearings were held on December 21, 1970, and January 14, 1971. On May 24, 1971, Deputy Commissioner Walter entered an order rejecting the claim because the request for a hearing was made more than one year after the carrier's final payment. He held that the claim was barred by Section 22 of the Act, 33 U.S.C. § 922.

Claimant filed an action in the district court to challenge the decision. Shortly thereafter, the Bureau of Employee Compensation concluded that the deputy commissioner's decision was incorrect and agreed to a consent decree remanding the case to the deputy commissioner for further proceedings.[4] On February 8, 1972, the deputy commissioner entered an order awarding claimant compensation for permanent total disability.

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[3] The change from total permanent to temporary partial disability limited the carrier's liability. Under the Act the maximum payable for partial disability was $17,280.00. 33 U.S.C. § 914(m) (1960). There is no maximum liability for total permanent disability.

[4] Neither the employer nor the carrier were parties to the district court action and neither consented to the remand.

Both the employer and the carrier brought this action under 33 U.S.C. § 921(b) to enjoin the deputy commissioner from enforcing the order. The district court granted summary judgment against the deputy commissioner. It held that the claim was barred by Section 22 of the Act. The court relied on *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108 (5th Cir. 1972) *cert. denied*, 409 U.S. 887 (1972).

The carrier did not request a hearing before the deputy commissioner during the lengthy administrative proceedings, nor did it ask the deputy commissioner to enter a final compensation order. No compensation order was entered prior to Deputy Commissioner Walter's order of May 24, 1971, which was superseded by his order of February 3, 1972.

Deputy Commissioner Walter appealed. Mary Jones, guardian of the incompetent claimant, intervened.

The basic time limitations on the filing of claims are embodied in Section 13 of the Act, which requires filing within a year after injury or after the last payment of compensation, if compensation has been paid without an award. A further time limitation on action by the Deputy Commissioner is contained in Section 22, which provides:

> **Modification of Awards**
>
> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accord-

> ance with such section issue a new compensation order . . . . Such new order shall not affect any compensation previously paid . . . .

The parties, like the Fifth Circuit in *Strachan Shipping*, have focused the issue almost exclusively on Section 22. We will consider the interpretation of Section 22, taking into account its purpose and legislative history. Nevertheless, we think it is important to stress the bearing of Section 13 on that interpretation, and to note that the claim of the injured employee was filed within one year of his injury as prescribed by Section 13. The issue for the court is not merely the meaning of Section 22 taken by itself, but the proper relationship of Sections 13 and 22 as elements of a sensible and coherent pattern of the statute as a whole.

The carrier contends that the order of February 8, 1972, was barred by the "plain language" of Section 22 because claimant did not request additional compensation until more than one year after the carrier stopped making compensation payments. The deputy commissioner contends that the time limitation in Section 22 applies only to the modification of a final order and does not affect his authority to issue an original order for a claim filed within the time permitted by Section 13.

The deputy commissioner's interpretation of Section 22 as applying only to a modification of a compensation order and not as an additional time limitation on the original filing of a claim is supported by the section's statutory title, "Modification of Awards",[1] and by its reference to an order issued under the section as a "new compensation order". These clauses indicate that the section applies to cases in which a compensation order has already been entered. Similarly, the inclusion of "a mis-

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[1] An "award" is a payment made under a compensation order. 33 U.S.C. § 919(e) (1972).

take in a determination of fact by the deputy commissioner" as a ground for modification of an award implies that a prior compensation order has been entered, since findings of fact are required only in compensation orders. *See* 20 C.F.R. §§ 31.12, 31.13 (1972).

Nevertheless, there is language in Section 22 which is directed to a situation in which no prior final order has been entered. The section provides that the deputy commissioner may review a case "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . ." This passage could mean that Section 22 applies even if no compensation order has been entered, or that it applies regardless of whether an order has been entered as of "the date of the last payment of compensation". The reference to "a change in conditions" as a ground for modification of an award is also ambiguous. It could refer to conditions found by the deputy commissioner to exist in a prior compensation order, or it could mean conditions which existed when payments were made without awaiting an order.

Since the language of Section 22 is ambiguous, we must look to other sources to determine whether Congress intended the time limitation in section 22 to apply to cases in which no final order was made.

Section 22, as enacted in 1927, permitted the deputy commisioner to review an order "at any time during the term of an award and after the compensation order in respect of such award has become final . . . ." Act of Mar. 4, 1927, c. 509, § 22, 44 Stat. 1437. Because of administrative delays and the Act's emphasis on voluntary compliance, carriers often not only paid compensation but also completed making payments before an order was entered. The deputy commissioner was unable to change the amount due the claimant because the "term

of the award" had expired with the last payment by the carrier. United States Employees' Compensation Commission, Seventeenth Annual Report, at 18 (1933); *Mille v. McManigal*, 69 F.2d 644 (2d Cir. 1934); *F. Jarka Co., Inc. v. Monahan*, 29 F.2d 741 (D.Mass. 1928).

In its Seventeenth Annual Report, the United States Employees' Compensation Commission complained that "Section 22 of the Longshoremen's Act provides [the deputy commissioner] with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State compensation law." *supra* at 18. The Commission recommended that Section 22 be amended to read as follows:

> Sec. 22 Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time review a compensation order . . . [and] issue a new compensation order . . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the deputy commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued. *supra* at 18.

The Commission's reference to a "new order", "the prior order", and "modification of an order formerly issued" indicates that the Commission did not recommend that Section 22 be amended to apply to cases in which no final order had been entered.

In 1934, Congress amended Section 22 "to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extend the time within which such modification may be made." H.R. Rep. No. 1244, 73d Cong., 2d Sess., April 16, 1934, at 4. The amendment was "in line with the

recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made." *Id.* The amendment deleted the original time limitation and substituted "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued." The phrase "whether or not a compensation order has been issued" was intended to make clear that the deputy commissioner has the authority to modify awards, within the prescribed period, even in cases in which the original compensation order was issued after all payments have been made to the claimant. The amendment did not change the purpose of the section, which, according to the House Report, was to allow deputy commissioners to "modify an award".

In 1938, Section 22 was amended to permit the deputy commissioner to make an award in a case in which he had originally rejected the claim. Act of June 25, 1938, c. 685, § 10, 52 Stat. 1167. The House Report said that "[t]he purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases *finally acted upon by the deputy commissioner.*" (emphasis supplied) H.R. Rep. 1945, 75th Cong., 3d Sess., March 14, 1938, at 9.

In our view, the legislative history shows that Congress intended Section 22 to apply only to cases in which the deputy commissioner had "finally acted" by issuing or denying a compensation order. The amendment was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application.

The Fifth Circuit came to the opposite conclusion. A divided panel of that court held in *Strachan Shipping Co. v. Hollis, supra,* that Section 22 barred timely filed

claims which were not refiled within one year after the last payment of compensation, even when no compensation order had been entered. The court did not discuss the legislative history and relied on the "plain language of Section 22". The *Strachan* majority said that:

> It would not be equitable, in our opinion, for courts to approve the deputy commissioner's vigorous efforts to secure voluntary compliance with the Act on the part of employers and their insurers while simultaneously approving the deputy commissioner's refusal to terminate compensation cases, by means of formal orders as envisioned in Section 22 of the Act, when voluntary payments are made.
>
> . . . .
>
> It may well be that our decision . . . will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations. 460 F.2d at 1116

We reject the reasoning of the Fifth Circuit. A carrier at any time can compel the deputy commissioner to hold a hearing on a pending claim and determine its liability within twenty days after the hearing. *See* 33 U.S.C. § 919(c); 5 U.S.C. § 706(1); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794 (5th Cir. 1960). There is no inequity in continuing pending claims when the carrier can compel a prompt determination.

Here the carrier did not ask for either a formal hearing or the entry of a compensation order, even though such an order would have started the one-year period in which modifications are permitted by Section 22.

The *Strachan* majority did not follow a long-standing and rational interpretation of the Act by the agency charged with the administration of the Act. The regulation issued under Section 22, promulgated on May 31,

1938, interprets Section 22 as affecting only those cases in which a final order was entered; it does not refer to cases in which an order was not issued.[8] We are unwilling to join the Fifth Circiut in setting aside an agency interpretation that has stood for more than 35 years. *See* Ainsworth, J., concurring and dissenting in *Strachan, supra* at 1117; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965).

A timely filed claim remains pending until a compensation order is entered by the deputy commissioner. *See Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke*, 60 F.2d 35 (2d Cir. 1932); *American Mutual Liability Ins. Co. of Boston v. Lowe*, 85 F.2d 625 (3d Cir. 1936).[9] Appellant argues that a claim is analogous to a complaint filed under the Federal Rules of Civil Procedure, which remains pending until disposed of by an order of court. We think the analogy has merit. It would be anomalous to require an injured workman to refile a claim in order to preserve his right to compensation when a plaintiff in a civil action does not have to refile his complaint in order to preserve his action. We also believe that such a requirement would contradict the statutory command that the deputy commissioner shall not be bound by "technical or formal rules of procedure" in proceedings under the Act. 33 U.S.C. § 923(a).

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[8] The regulation refers only to "application[s] . . . for modification of an award". 20 C.F.R. § 31.16(a) (1972).

[9] Appellees cite *Lowe* for the proposition that the one-year limitation in Section 22 applies regardless of whether a compensation order has been issued. The *Lowe* court said in dicta that a claim would be barred by Section 22, as amended in 1934, "if we assume that the memorandum . . . was a final order within the terms of the statute". The court did not say that the claim would be barred if no final order had been entered.

The Fifth Circuit's holding bars timely filed unadjudicated claims unless claimants file new claims within one year after their carriers stop paying compensation. Carriers may find it to their advantage to stop payments frequently in the hope that claimants not familiar with the agency's regulations would neglect to file another claim.[10]

The Longshoremen's and Harborworkers' Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see B & P Steamboat Co. v. Norton*, 248 U.S. 408 (1932). It would be harsh and incongrous to force a claimant to refile an unadjudicated claim each time his carrier terminated payments to avoid having his right to compensation permanently barred.

We hold that Section 22 applies only to cases in which a final compensation order has been entered or denied. A claimant, in order to preserve his claim, is not required by Section 22 to refile his timely filed but unadjudicated claim after a carrier stops paying compensation.

All parties agree that appellees are liable for claimant's medical expenses.

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion.

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[10] *See* letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, to Leavenworth Colby, August 6, 1971, appended to the opinion of Ainsworth, J., concurring in part and dissenting in part in *Strachan, supra* at 1117.

In *Strachan* the carrier stopped paying compensation four times and stopped paying medical benefits twice during a fourteen-year period. Although the repeated termination of benefits in *Strachan* may not be typical, it does show that claimants may be forced to refile claims repeatedly if each termination starts the limitations period to run.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellees,

v.

NOAH C. A. WALTER, Deputy Commissioner,
U.S. Department of Labor, Bureau of Employees Compensation,
Appellants,

MOTION FOR ATTORNEYS FEES

Undersigned counsel for Intervenor, MARY JONES, as guardian for the claimant, CHARLES E. JONES, incompetent, moves that the Court, under the provisions of 33 U.S.C.A. #928(a) (as amended) enter an order awarding attorney's fees for services rendered to the claimant herein, on the following grounds:

1. That undersigned counsel has been retained by MARY JONES, throughout these proceedings to prosecute the claimant's right to compensation and medical treatment and care. That undersigned counsel has heretofore been paid $3,500.00 by order of the Deputy Commissioner out of compensation recovered for the claimant as a result of

of compensation recovered for the claimant as a result of representing claimant at final hearing before the Deputy Commissioner and in appeal to the United States District Court challenging the Deputy Commissioner's initial order denying compensation.

2. That in the appeal of the Deputy Commissioner's order of 8 February 1972 granting claimant compensation for permanent total disability to the United States District Court for the District of Columbia by the carrier, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and the employer, INTERCOUNTY CONSTRUCTION CORPORATION, undersigned counsel did not appear in these proceedings, but continued to be retained throughout and maintained contact and coordination with LEAVENWORTH COLBY, Esq., of counsel, United States Department of Justice, representing the Deputy Commissioner.

3. That upon the United States District Court rendering its judgment on 15 February 1973 enjoining the Deputy Commissioner from carrying into effect any part of the order in 2, above, the Department of Labor filed its Notice of Appeal, and that undersigned counsel intervened before this Court in behalf of claimant as agreed between the undersigned and counsel in behalf of the Deputy Commissioner in 2, above.

4. That undersigned counsel, in intervention in behalf of claimant utilized some 177 hours; that the judgment of this Court was in favor of claimant, the cause being remanded to the District Court.

5. That though this cause was pending below when the provisions of 33 U.S.C.A. #928(a) (as amended October 27, 1972, Pub. L. 92-576, #13, 86 Stat. 1259) became effective on 26 November 1972, attorney's fees in behalf

of undersigned counsel for claimant, are properly assessable against the carrier, HARTFORD, and the employer, INTERCOUNTY, re: OVERSEAS AFRICAN CONSTRUCTION CORP., Employer and ST. PAUL MERCURY INSURANCE CO., Carrier v. EUGENE McMULLEN, Deceased, by GEORGE McMULLEN, Executor, and JOHN D. McLELLAN, Jr., Deputy Commissioner, United States Employees Compensation Commission, Second Compensation District, Second Circuit Court of Appeals, Nr. 948, 1064, 1108 - September Term 1973 (Docket Nr. 74-1092, 74-1103, copy attached as Exhibit #1 hereto, 74-1538) decided 5 July 1974 (as yet unreported).

6. That undersigned counsel would suggest attorney's fees in the amount of $3,000.00 would be appropriate based upon the affidavit attached at Exhibit #2 hereto.

I CERTIFY that a copy hereof has been provided to counsel of record by mail this 14th day of August, 1974, at:

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UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 948, 1064, 1108–September Term 1973.

(Argued May 17, 1974 Decided July 5, 1974.)

Docket Nos. 74-1092, 74-1103, 74-1538

OVERSEAS AFRICAN CONSTRUCTION CORP.,
Employer,
and ST. PAUL MERCURY INSURANCE CO.,
Carrier,
Appellants-Cross Appellees,

v.

EUGENE McMULLEN, Deceased, by GEORGE McMULLEN, Executor, and JOHN D. McLELLAN, JR., Deputy Commissioner, United States Employees Compensation Commission, Second Compensation District,
Appellees-Cross Appellants.

Before:

MEDINA, HAYS and OAKES,
Circuit Judges.

Appeal and cross appeal from a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* confirming an award made by Deputy Commissioner McLellan in favor of the late Eugene McMullen and denying the prayer of McMullen's estate seeking the assessment of legal fees incurred by it in the district court against appellants.

Affirmed in part; reversed in part.

IRWIN B. SILVERMAN, Brooklyn, New York (Jacowitz & Silverman, P.C., Brooklyn, New York, of counsel), *for Appellants-Cross Appellees.*

ANGELO C. GUCCIARDO, New York, New York (Israel, Adler, Ronca & Gucciardo, New York, York, New York, of counsel), *for Appellees-Cross Appellant McMullen.*

JOSHUA T. GILLELAN, II, Washington, D.C. (William J. Kilberg, Solicitor of Labor, James G. Johnston, Assistant Solicitor of Labor, George M. Lilly, Washington, D.C., of counsel), *for Appellee Cross Appellant McLellan.*

OAKES, *Circuit Judge:*

The principal appeal is by St. Paul Mercury Insurance Co. (St. Paul) on behalf of itself and Overseas African Construction Corp. (Overseas African). St. Paul questions the jurisdiction of the deputy commissioner, United States Employees Compensation Commission, to make a $12,495.50 award,[1] handed down June 22, 1972, on the behalf of claimant Eugene McMullen (claimant), a former employee of Overseas African, who died some five months prior to the awards being made. Jurisdiction was assumed and the

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[1] The award was for $11,250.00 on the basis of $70.00 per week from January 1, 1969, to January 30, 1972, plus $1,245.50 for documented medical expenses incurred during this period. A fee of $2,500.00 for claimant's attorneys was fixed by the deputy commissioner to be paid out of the compensation awarded.

award made by the deputy commissioner under the Defense Base Act, *as amended,* 42 U.S.C. §§1651 et seq. (the "Act"),[2] which applies the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et sq.* (LHWCA), to certain types of employees. The deputy commissioner and the estate of the claimant have taken a cross appeal in connection with the district court's refusal to assess attorney's fees against St. Paul.

St. Paul filed its action to set aside the award on July 21, 1972, pursuant to 33 U.S.C. §921. In a memorandum opinion and order dated November 21, 1973, on cross motions for summary judgment, the district court dismissed St. Paul's challenge to the award and affirmed the award in claimant's favor. The court also imposed a statutory penalty on St. Paul under 33 U.S.C. §914(f).[3] The court also denied claimant's demand for payment by St. Paul of his legal fees spent in prosecuting his claim, a claim apparently based solely on 33 U.S.C. §926, saying that the basis for St. Paul's appeal was not so "frivolous or malicious" as to require such an assessment. The court

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[2] This Act was adopted to extend coverage to employees working on defense bases including originally particularly those acquired from Great Britain on a lend-lease basis. *See Republic Aviation Corp. v. Lowe,* 164 F.2d 18 (2d Cir. 1947) (Chase, *J.), cert. denied,* 333 U.S. 845 (1948). As such it was a "remedial act" to be "interpreted to accomplish so far as is possible the purposes for which it was intended." *Id.* at 20.

[3] Under §14(f) of the LHWCA, if payment of an award is not timely made (within 10 days) and no stay is sought or granted, a 20 per cent penalty "shall be imposed" by the district court. 33 U.S.C. §914(f). Thus, the total amount of the award before this court is $14,994.60.

did not comment on the possible impact of an amendment to 33 U.S.C. §928—which had become effective on November 26, 1972[4] —on the question of assessing legal fees against St. Paul. On November 30, 1973, claimant's counsel wrote a letter to the district court which pointed out the possible relevance of the amended version of §928 to the question of legal fees. The court, treating the letter as a motion to reargue, adhered to its prior determination (which had reached the question of attorney's fees under §926 but not §928) and assessed legal fees in the sum of $1,800 against the claimant's estate under §928 as it existed prior to its amendment.

The claimant was hired in New York by Overseas African and was assigned to a project at Chisimaio, Somalian Republic, Africa, during the period from May, 1968, to December, 1968, as project manager and chief accountant.[5] The project was under the general supervision of the United States Army Corps of Engineers, which approved for acceptance the various parts of the construction project as they were completed. The project was funded by AID, the Agency for International Development, United States Department of State. The funds came from "Chisimaio Port and Municipal Facilities Loan No. 649-H-002 (Chisimaio loan)." While working on this project, claimant

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[4] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, §13, 86 Stat. 1251, -59, -65.

[5] Overseas African was a wholly owned subsidiary of Reynolds Construction Co., which was the original overseas contractor for this project and to which the insurance policy orginally underwritten by St. Paul ran as insured. The contract between the Somalian Republic and Reynolds was assigned by the latter to Overseas African and, by endorsement to the St. Paul-Reynolds insurance policy, it was agreed that the name of the insured was amended to include the interest of Overseas African.

contracted a skin disorder, diagnosed as neurodermatitis, which eventually forced his return to the United States and which all parties concede to be a legitimate basis for the compensation awarded by the deputy commissioner and approved by the district court. Claimant's death on January 30, 1972, from unrelated causes, came about five days after the hearing on his claim before the deputy commissioner.[6] There is no dispute whatsoever that claimant was temporarily totally disabled and, if the Act conferred jurisdiction on the deputy commissioner, was entitled to the award which was made together with the penalty assessed by the district court.[7]

The claim of St. Paul is that the deputy commissioner and the court below were without jurisdiction to enter an award and judgment respectively under the Defense Base Act. The claim is evidentially based solely on a letter from AID bearing a date of February 22, 1972, which is set forth in the margin.[8] The district court affirmed the

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[6] On August 21, 1969, claimant settled a claim under a separate policy, #GR 1018, with AFIA-St. Paul Mercury Insurance Co., Overseas African and/or Reynolds, for $1,800.00. This policy involved compensation under the rubric of "Non-occupational Sickness Weekly Indemnity Benefits" and was found by the deputy commissioner to have no bearing on claimant's rights under the Defense Base Act.

[7] With $2,500.00 fixed as attorney's fees by the deputy commissioner and $1,800.00 by the district court, as the cases come to us $4,300.00 is chargeable against the overall recovery of $14,994.60 exclusive of any fees which might be awarded in this appeal.

[8] The pertinent portion of the letter is as follows:

> The following information is supplied in response to your inquiry to Mr. Barry Wallace concerning Overseas African

(continued)

deputy commissioner's finding that this letter did not overcome the statutory "presumption" of jurisdiction.[9] St. Paul argues that the construction contract was between the employer and the Republic of Somalia, and that while it may have been approved and financed by the United States, there is an exception as a matter of law to jurisdiction of employees' compensation claims under the Defense Base Act *as amended*, 42 U.S.C. §1651(a)(5), in the case of projects financed from the Development Loan Fund. Section 1651(a) does state that

> the provisions of the Longshoremen's and Harbor Workers' Compensation Act . . . shall apply in respect to the injury or death of any employee engaged in any employment . . . (5) under a contract approved and financed by the United States or any executive department . . . or agency thereof . . . where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954, as amended *(other than title II of chapter II thereof* unless the Secretary of Labor, upon the recommendation of the head of any department or other agency of the United States,

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[8] (continued)
Construction Corporation's work on the Chisimaio Port project. The work performed by Overseas African was totally financed on a development loan basis. The applicable loan is designated as Chisimaio Port and Municipal Facilities Loan No. 649-H-002.

[9] In any proceeding for the enforcement of a claim for compensation under the LHWCA "it shall be presumed, in the absence of substantial evidence to the contrary – (a) that the claim comes within the provisions of this chapter." 33 U.S.C. §920.

> determines a contract financed under a successor provision of any successor Act should be covered by this section) . . . .

(Emphasis added.)

St. Paul's argument is, then, that since title II of chapter II of the Mutual Security Act of 1954 established a Development Loan Fund as an agency of the United States and body corporate authorized to make loans to promote the economic development of underdeveloped friendly countries, and since the letter from AID says that the work performed by Overseas African was "totally financed on a development loan basis," the work here was not work to which the Defense Base Act and the LHWCA extended.[10]

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[10] The original statute establishing the Development Loan Fund as a corporate agency was repealed by the Foreign Assistance Act of 1961, Pub. L. No. 87-195, pt. III, ch. 3, §642(a)(2), 75 Stat. 460. That act established a new "Development Loan Fund" to be used by the President to make loans pursuant to the authority contained in the Act and the new fund provisions are set forth in 22 U.S.C. §§2161-69 inclusive. Technically speaking, there is no longer any title II, chapter II, exception to the Mutual Security Act of 1954 *as amended*, 42 U.S.C. §1651 (a)(5), but the Development Loan Fund referred to in 22 U.S.C. §§2161-69 must be read as continuing the exception to 42 U.S.C. §1651 (a)(5), since §642(b) of the Foreign Assistance Act of 1961, 75 Stat. 460, provided that

> References in law to the Acts, or provisions of such Acts, repealed by subsection (a) of this section shall hereafter be deemed to be references to this Act or appropriate provisions of this Act . . . .

and since old title II, chapter II, was replaced by the similar provisions of pt. I, ch. 2, title I of the 1961 Act (comprising §§201-05), 75 Stat. 426-27, now *as amended*, 22 U.S.C. §§2161 *et seq.*

Apparently this highly technical argument is a bit of an afterthought, for both the employer and St. Paul thought that the Chisimaio project was a Defense Base Act project and respectively sought and supplied insurance coverage in relation to it. The contract of employment between Overseas African as employer and Mr. McMullen, the employee, provided that the employer would

> procure and pay the premiums for such compensation insurance as will accord to Employee . . . the statutory benefits for death or injury to which the Employee may be entitled under the applicable Federal law of the United States including but not limited to the Defense Base Act and War Hazards Compensation Act. Said workmen's compensation insurance shall also include coverage of Employee for illness due to endemic diseases of Somalia. . . .

St. Paul's policy originally had provided in Section 2, Coverage A,

> The company agrees to pay voluntarily on behalf of the insured, to the employees defined in Section 1 of this endorsement, the compensation, medical and other benefits specified in the Workmen's Compensation Law and Occupational Disease Law of the state designated in Item 3 of the declarations [New York] in the same manner as if such employees were covered under the provisions of said law or laws.

By endorsement the policy was amended to read "Policy includes employees working in Chisimaio, Somalia (estimated at eleven)" and another endorsement provided rather cryptically, "It is understood and agreed that Public Law 208 benefits apply as respects the A.I.D. Projects

only."[11] "Public Law 208" is the Defense Base Act.

Certainly a prima facie showing of federal jurisdiction in this case is made out by the contract of insurance itself, especially in light of the apparently successful argument of St. Paul – after claimant had originally proceeded in the New York state courts to attempt to establish compensability under the relevant state statutes – that a federal forum was the appropriate one for resolution of the dispute. A strong argument can be made that St. Paul should be estopped from challenging federal jurisdiction over the dispute, or from raising the point that, as a factual matter, the contractual relationships involved a specific exception to jurisdiction over a dispute that is otherwise clearly a federal matter. Without rendering our decision on this basis, we would nevertheless remark that St. Paul's actions during the course of this dispute can and should be weighed in connection with whether it has overcome the statutory presumption of jurisdiction.

So doing, we agree with the deputy commissioner and with the court below that the AID letter of February 22, 1972, is insufficient to overcome the statutory presumption of jurisdiction. The rule, of course, is that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 474 (1947); *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 645-46 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965). *But see Employers Mutual Liability*

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[11] We say "cryptically," because it is now claimed by the insurer that the case falls within an exception to the Public Law 208 benefits because it was an AID "development loan" project.

Insurance Co. v. Arrien, 244 F. Supp. 110, 113 (N.D.N.Y. 1965) (distinction between presumption of coverage and presumption of jurisdiction). The AID letter does not indicate the relationship between the parenthetical exclusion in §1(a)(5) of the Defense Base Act, 42 U.S.C. §1651(a)(5), and the assertion that Overseas African's contract "was totally financed on a development loan basis." St. Paul did nothing to prove that relationship before the deputy commissioner, before the court below, or before us. For all that appears before us there are other foreign assistance act loans, and there are other forms of development loans than those made from *the* Development Loan Fund.

Thus it becomes unnecessary for us to pass upon the deputy commissioner's assertion that this contract was covered by 42 U.S.C. §1651(a)(4),[12] or to pass upon the claim of the claimant's estate that, because the employer appeared and conceded jurisdiction and under 33 U.S.C. §935 the jurisdiction of the employer "shall be jurisdiction of the carrier," the concession of the employer is ipso facto the concession of the carrier.

We pass then to the question of attorneys' fees. To recapitulate, the deputy commissioner approved a fee of $2,500 for the services of the claimant's attorney and directed that this be paid out of the total award. The district court fixed the value of the claimant's estate's attorney's services at $1,800 in addition thereto, and directed

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[12] Since the contract appears to have been executed solely by the Republic of Somalia and not by the United States as a party, it would not appear to fall within the provisions of 42 U.S.C. §1651(a)(4). However, it is on a federal form and apparently a federal "contracting officer" approved the assignment from Reynolds Construction Co. to Overseas African.

that this also be paid by the executor out of any funds received by him. These awards were clearly authorized by 33 U.S.C. §928 as it existed prior to its amendment. On cross appeal here the deputy commissioner and the claimant's estate raise two arguments concerning who should pay these fees. The first argument is that the district court erred in not finding that all counsel fees in that court should be chargeable to St. Paul by virtue of 33 U.S.C. §926, which allows for the imposition of all costs upon a party that institutes or continues proceedings relative to workmen's compensation "without reasonable ground. . . ." The second argument is that at least those legal expenses incurred by claimant's estate after November 26, 1972, are recoverable against St. Paul irrespective of whether "reasonable grounds" existed for St. Paul's resistance to the claim under the provisions of §928 *as amended.*[13]

Considering first the argument under §926, as it relates to legal fees in the district court, we believe the following

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[13] Section 928(a), *as amended,* reads as follows:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

factors to be determinative in claimant's favor. On the appeal from the deputy commissioner's order to the district court, St. Paul raised several issues concerning the award in its pleadings – the usual stock defenses in such cases– but pressed only the jurisdictional issue. The district court found the jurisdictional issue to be the "only serious issue" before it but, after stating that both St. Paul and Overseas African "both regarded the Chisimaio project as within the Defense Base Act . . . ," held that the jurisdictional argument was neither "frivolous [n]or malicious." With that we may agree, but compensation acts generally and the LHWCA specifically contemplate the voluntary payment of compensation to the claimant upon receipt of notice of disability or injury. Here, legal proceedings were held before the New York State Workmen's Compensation Board where, for all practical purposes, they were adjourned because of St. Paul's refusal to "waive" its "admiralty or interstate commerce rights and remedies," before the United States Employees Compensation Commission. For its own reasons, St. Paul resisted the jurisdiction of the deputy commissioner, the district court and now this court, even though there has never been any serious claim that the claimant (or his estate) was not entitled to relief at all times. The only claim consistently advanced by the carrier has been that relief has not been sought in the proper forum. On the facts, and in light of the policy for expeditious payment of claims, we feel the jurisdictional claim to be so insubstantial as to require the carrier to bear the expense of the legal fees in the district court, and the judgment of the district court in this respect is reversed.

Legal fees in this court, which we set at $2,000.00, we find to be governed by the provisions of 33 U.S.C. §928 (a) & (c) *as amended.* Under §928(a), a claimant, whose

claim is resisted by a carrier, who successfully prosecutes that claim has an absolute right to recover his legal expenses incurred in that prosecution. The only serious dispute involving §928(a) is whether, as a statutory matter, Congress intended that section to apply to cases pending in any forum on November 26, 1972 (the effective date of the amendments), and, if so, whether there be any constitutional impediment to such an application. These questions need not detain us long. In *Virginia Hotel Co. v. Mills,* BRB No. 133-73 (Ben. Rev. Bd. Apr. 2, 1974), the Benefits Review Board of the Department of Labor, which, under 33 U.S.C. §921(b)(3), replaces the district court for purposes of appealing a compensation order, held that the absence of any legislative history to the contrary indicated congressional intent that the amendments–here involving procedural and remedial aspects of workmen's compensation disputes–should be applied to pending proceedings. There being no savings clause in the amendments, we fully concur with the *Mills* decision on this point. As was said by the Supreme Court in *Sampeyreac v. United States,* 32 U.S. (7 Pet.) 221, 238 (1833), "Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed." *See Ahmed's Case,* 278 Mass. 180, 179 N.E. 684 (1932). *Cf. Bradley v. Richmond School Board,* 42 U.S.L.W. 4703 (U.S. May 15, 1974). *See generally* 3 A. Larson, The Law of Workmen's Compensation §§83.12, 83.17 (1973). As for any constitutional objections to such retrospective application of §928(a) as is involved here, objections not raised directly by St. Paul in its briefs, we agree with the *Mills* decision to the effect that the date the right of action accrued has no constitutional significance. As of November 26, 1972, St. Paul was on notice that §928(a) *as amended* might be applied to its case respecting legal fees should St. Paul fail

to prevail on its appeal in both the district court and on further appeals it might choose to take.[14]

For the reasons stated herein, the judgment of the district court to the extent that it affirmed the award of the deputy commissioner is affirmed; so much of the district court's judgment as denied claimant's entitlement to legal fees in that court is reversed and the cause remanded to the district court for entry of an order directing St. Paul to make good those expenses. Legal fees assessed in this court are to be paid in accordance with this opinion.

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[14] Thus, if our judgment on the §926 issue with respect to legal fees in the district court should be found erroneous by the Supreme Court, claimant's estate would still be entitled to recovery of any legal expnses incurred in the district court after November 26, 1972, should our view of §928(a) be sustained. We reach the §928(a) question because we feel that the claim for legal fees made in this court should be decided under §928(a), even though our views with respect to legal fees under §926 in the district court would be equally applicable to fees in this court. The rationale for this position is that we see the 1972 Amendments to the LHWCA as superseding §926 in that they provide for the first time what is clearly a congressional preference that attorneys' fees not diminish the recovery of a claimant regardless of how close a case might be which is litigated but finally lost by a carrier. This appeal, because it was perfected after the effective date of the 1972 Amendments, should therefore be decided on the law most clearly applicable at that time.

[EXHIBIT 2]

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF PINELLAS)

BEFORE ME, the undersigned authority, personally appeared George H. Brown, III, who, upon his oath, stated:

1. That he is an attorney at law duly licensed to practice before the Supreme Court of the United States, the Supreme Court of the State of Florida and other Federal and State tribunals.

2. That he has been engaged in the practice of law for fourteen (14) years, with the major portion of his practice being devoted to Workment's Compensation cases in the State of Florida and other states as well as cases involving social security disability, longshoreman's and maritime injury claims.

3. That he has examined the file of counsel for the intervenor, Jefferson de R. Capps, concerning his representation of the intervenor, Mary Jones, in the cause entitled Intercounty Construction Corp. and Hartford Accident and Indemnity Company vs. Noah C.A. Walter, etc., being Case No. 73-1569 in the United States Court of Appeals for the District of Columbia Circuit and has been advised that said attorney has spent 176 hours in the appellate proceedings in said cause, and being cognizant of the novelty and difficulty of the issues presented, the skills utilized, the standing of respective counsel in the cause and the Cannons of Ethics dealing with the setting of attorney fees, feels that a fee in the amount of $3,000.00 would be reasonable compensation for said attorney for services rendered to the intervenor-claimant in this cause.

FURTHER, the deponent saith not.

/s/ George H. Brown, III
GEORGE H. BROWN, III

Sworn to and subscribed before me this 14th day of August, 1974.

/s/ Gail F. Mack
Notary Public

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires 11, 1977

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* * * * *

OPPOSITION TO INTERVENOR'S MOTION FOR ATTORNEY'S FEES

Appellees, Intercounty Construction Corp. and Hartford Accident & Indemnity Co., by counsel, oppose the Motion of counsel for intervenor to have attorney's fees awarded against them on the following grounds:

(1) This court is without jurisdiction to grant the relief requested.

(2) The Motion fails to comply with the applicable regulations.

(3) The statute, as applied to the circumstances in this case, is unconstitutional.

I. No Jurisdiction

The decision by the panel, reversing the District Court, was rendered on July 3, 1974, and the case was remanded for further proceedings consistent therewith. On July 26, 1974, a copy of this court's opinion and a certified copy of the judgment accompanying same in lieu of a mandate was transmitted to the District Court.

Rule 13(d) of the U.S.C.A. G'l Rules for this Circuit specifies that where a *case* is remanded, the Court of Appeals does not retain jurisdiction. Even without reference to that local rule, the Court of Appeals is not the appropriate forum for requesting the imposition of attorney's fees under the District of Columbia Workmen's Compensation Act and Longshoremen's & Harbor Workers Compensation Act. *General Accident Fire & Life Assurance Corp.*, 102 U.S. App. D.C. 207, 251 F.2d, 961 (1958); *Henderson, et al v. Avondale Marine Ways, Inc.*, 205 F.2d, 518 (5th Cir. 1953).

II. Failure to Comply with Applicable Regulations

Intervenor's counsel's application for attorney's fees made pursuant to 33 U.S.C. §928(a), as awarded, should be denied for failure to comply with the regulations pertaining to same. 20 C.F.R. §702.132 – "Fee for services," provides:

> "An attorney or other representative seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application thereof to the persons, administrative body, or court before whom the services were performed (see 33 U.S.C. 928(c)). The application shall be supported by a complete statement of the extent and character of the necessary work done. Any fee approved shall be reasonably commensurate with the actual necessary work performed, and shall take into account the capacity in which the representative has appeared, the amount of benefits involved and the financial circumstances of the claimant. No contract for a stipulated fee or for a fee on a contingent basis shall be recognized."

Here intervenor's counsel alleges conclusionarily that he spent "some 177 hours" on the appeal without further recitation or specification. He then attempts to bootstrap this shortcoming by relying on an *ex parte* affidavit from another local St. Petersburg attorney. It is submitted that this falls far short of what the regulation requires.

It should also be pointed out that at all time relevant hereto, both in the District Court and on appeal, Leavenworth Colby, Esq., Special Assistant to the Attorney General, U.S. Department of Justice, (as counsel for Deputy

Commissioner Walter) has participated in this case, and it was he who, advancing a position totally consistent with the intervenor's, arranged with appellee's counsel for the stipulated joint appendix, and who orally argued the case on appeal. In fact, although the sole issue on appeal (aside from medical expenses) was whether the statute of limitations barred the workmen's compensation claim of Charles Jones, and was briefed as such by Mr. Colby and appellee's counsel, the intervenor's brief attempted to deal with other matters not even passed on by the lower court, which were not even appropriately on appeal. Certainly some of the 177 hours spent by intervenor's counsel must be attributable to those points which were not properly on appeal.

III. Unconstitutionality and Retroactivity

Employee Charles Jones was injured on July 19, 1960. He received workmen's compensation payments voluntarily paid by the carrier until January 23, 1968. On February 11, 1970, a hearing was requested by his attorney for permanent and total disability. After a formal evidentiary hearing on May 24, 1971, Deputy Commissioner Walter rejected the claim as being barred by the statute of limitations in §22 of the Act. Eventually, on February 8, 1972, by virtue of court remand proceedings, the Deputy Commissioner awarded permanent and total disability to the claiment on the merits.

Suit was commenced by the employer and carrier in March of 1972, and its Motion for Summary Judgment was filed on October 13, 1972. The Deputy Commissioner's cross-motion for summary judgment was filed on November 20, 1972. Section 28 of the Act was formally amended on October 27, 1972, and became effective on November

26, 1972. The District Court upheld the statute of limitations as a bar on February 13, 1973. During the pendency of the district court proceedings, until the reversal of the Deputy Commissioner by the lower court, the carrier continued to pay compensation in accordance with the February 8, 1972, award.

Given the foregoing timetable and the reversal of the district court by this court on July 3, 1974, it is respectfully submitted

A. Unconstitutionality.

Section 28 of the Longshoremen's Act as it existed on July 19, 1960, the date of Mr. Jones' injury, provided that attorney's fees approved by the Deputy Commissioner were to be a lien out of any compensation awarded. The November 26, 1972, amendments to Section 28 provided in essence, however, that if the claim for compensation was controverted and compensation benefits were eventually awarded, reasonable attorney's fees were assessable against the employer and carrier in addition to the award of compensation itself.

Article I, Section 10, Clause 1, of the Constitution of the United States provides, in pertinent part, that no state shall pass a law impairing the obligation of contracts. It was stated in *Mitchell v. U.S.F. & G. Co.* (DC–Tenn) 206 F. Supp. 489, (1962) that

> "the right of an injured employee to compensation benefits arises from his contractual relationship with his employer existing at the *time* of his injury, and the statute *then* in force forms a part of the contract and determines the substantive rights and obligations of the parties, 58

> Am Jur 599, Workmen's Compensation, Sec. 33; 82 A.L.R. 1244. To the extent that Workmen's Compensation statutes do form a part of the contractual relationship between an employee and his employer, the Constitution of the United States prohibits the enacting states from impairing the obligation of such contracts. Cf. *Phillips v. City of West Palm Beach* (Fla. S.Ct.), 70 So. 2d 345 (1953); *Salmon v. Denhart Elevators,* 72 S.D. 110, 30 N.W.2d 644 (1948)."

Although it might be said that this part of the Constitution is inapplicable since it is directed to the states, it has been held that the Fifth Amendment to the Constitution provides a measure of protection against contract impairment where the Federal government is involved. *John McShain, Inc. v. District of Columbia,* 92 U.S. App. D.C. 358, 205 F.2d 882 (1953); *Johnson v. United States,* 111 Ct. Cl. 750, 79 F. Supp. 208, 211 (1948); *Miller v. Howe Sound Min. Co.,* 77 F. Supp. 540 (DC–Wash., 1948); *Trozze v. Drooney,* 232 NY. S.2d 139, 35 Misc. 2d 1060 (1962); *Fleming v. Nestor,* 363 U.S. 603, 611 (1960).

As the foregoing authorities suggest, there is no real distinction between states' constitutional restrictions on the impairment of contract rights and the federal government. If that premise is correct, then Section 28 of the Act, as amended, as applied to this case, is unconstitutional.

Amendments to the Connecticut Workmen's Compensation Statute which purported to change the rate of workment's compensation for injuries which had occurred prior thereto were held to have violated the Constitution in *Preveslin v. Derby and Ansonia Development Co.,* 112 Conn. 129, 151 A. 518 (1930). A similar attempt in the State of Florida was constitutionally nullified in *Phillips*

v. City of West Palm Beach, supra, as was an effort to assess attorney's fees for pre-amendment injuries. *Hardware Mut. Cas. Co. v. Carlton,* 151 Fla. 238, 9 So.2d 359 (1942). Where the subsequent legislation affects the remedy only, such as extending a period for formal review or the statute of limitations, then the courts generally have not perceived any constitutional infirmity. *New Amsterdam Cas. Co. v. Cardillo,* 71 App. D.C. 172, 108 F.2d 492 (1940): *Luckenbach S.S. Co. v. Norton,* 106 F.2d 137 (3rd Cir., 1939); *J. W. Ferguson Co. v. Seaman,* 119 N.J. L. 575, 197 A. 245 (1938).

The impairment of contract clause in the Federal constitution is intended to protect the benefits and rights of each party under the contract and if the liability of one of those parties is enlarged, then due process would seem to be violated. *Stoneridge Apts. Co. v. Linday,* 303 F. Supp. 677 (D.C. N.Y., 1969); *J. W. Ferguson Co. v. Seaman, supra.*

It has also been held that the Fifth Amendment to the United States Constitution protects vested rights and that such vested rights cannot be destroyed, divested or impaired by direct congressional legislation. *Deutsche Bank Und Discoto-Gesellschaft v. Cummings,* 65 App. D.C. 296, 83 F.2d 554 (1936). Quoting Justice Field on vested rights in the case of *Pacific Mail S.S. Company v. Joliffe,* 2 Wall. 450, 457, 17 L.Ed. 805 (1864), the court stated, at p. 559:

> "When a right has arisen upon a contract, or a transaction, in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not

affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Noted in the course of the opinion was the case of *Ettor v. City of Tacoma,* 228 U.S. 148 (1913), which by analogy appears to present the converse of the situation existing in this case. There the State of Washington enacted a statute which allowed abutting property owners to recover comepnsation for consequential damages arising out of a street grading made under municipal direction. After the Plaintiff had sustained the type of damage contemplated by the statute, the law was repealed. The Supreme Court held that the repealing legislation deprived the plaintiff of a right which had vested and, as such, was a vested property right which could not be defeated by subsequent legislation. The right to workmen's compensation benefits under the Longshoremen's Act has been held to be a property right. *Maryland Casualty Company v. Lawson,* 110 F.2d 269, 270 (5th Cir., 1940).

The essence of appellee's complaint is that the substantive rights of the parties should be fixed as of the date of death. Those workers covered by the District of Columbia Workmen's Compensation Act were entitled to certain benefits prior to the 1972 amendments. The obligations imposed upon the employer and workmen's compensation carrier should similarly be fixed as of that date. Determination of insurance premiums and the regulation of same by the insurance commissioners in the various states are regulated by many factors, including claims experience and potential exposure under the Workmen's Compensation statutes. To permit subsequent Congressional legislation to alter already existing contractual rights and responsibilities would not only be inequitable and unfair, but unconstitutional.

Suppose, for example, that Congress, by its 1972 amendments, had reduced the weekly benefits to $30.00 per week, or abolished workmen's compensation benefits enitrely because the economic burden was too great on the business community or because it felt that the entire workmen's compensation program was not working, would not the claiment seek redress in court on the grounds that the rights which he had in existence at the time he was hurt had been unconstitutionally reduced or abolished? Would the same argument not be made if under the original compensation statute all attorney's fees in contested cases had to be paid by the insurance company, whereas by virtue of subsequent amendments, counsel fees had to be borne by the claiment as a lien out of his compensation?

It is respectfully submitted that §28 of the Longshoremen's Act, as applied by the Benefits Review Board to a pre-amendment accident is unconstitutional.

B. Amendments Should Be Given Prospective Effect Only.

The question of whether amendments to an existing statute should be given prospective or retrospective application is one which is not uncommon. It can be stated generally that retroactive application of legislation is not favored except upon the clearest mandate. *Clairidge Apartments Company v. Commissioner of Internal Revenue,* 323 U.S. 141, 164 (1944); *Greene v. United States,* 376 U.S. 149 (19).

In the case of *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir., 1974), the court considered whether the indemnity amendments to the Longshoremen's Act,

effective November 26, 1972, were to be given prospective or retrospective application. The court traced the legislative history of expressions of congressional intent and concluded that the amendments should be given prospective application only. The court emphasized that the critical date was the date of the longshoremen's injury. It was then that his rights vested against the shipowner and then that the shipowner's rights vested against the stevedore. Although the third party complaint seeking indemnity was filed after the 1972 amendments were effective, the parties' rights were considered as having been fixed in July of 1972 when the claimant was injured.

A similar approach was adopted in the case of *Bell v. Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla., 1973). In the course of his opinion at page 159, the District Court Judge stated:

> "Further evidence of Congressional intent that the section be applied prospectively is the fact that the amendments also improved the benefit structure of the Act. The maximum benefit amounts were increased, along with other changes in calculations of benefits and survivor benefits. . . "

The report from the House of Representatives, Report No. 92-1441, 92nd Cong. 2d Sess. (1972) which accompanied the proposed 1972 amendments to the Longshoremen's Act, began the explanation of the purpose and background of the amendments, as follows:

> "Amendments to Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70.00 a week. Today, the average

> longshoreman's or ship repairman's wage is over $200.00 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law, a substantial increase in benefits is needed . . . " (118 Congressional Record, page 4698-4699).

Shifting the responsibility for payment of attorney's fees from the claimant to the carrier where the claimant prevails is obviously a substantive benefit which constitutes a monetary increase and emolument to the worker. Monetary benefits of this sort should be given prospective effect only.

The case of *Overseas African Const. Corp., et el. v. McMullen, et al.*, ____ Fed. ____ (2nd Cir., 1974), attached to Intervenor's Motion should not be controlling. The only constitutional question dealt with was retroactivity and not the other infirmities earlier set out by appellees herein in this opposition. The carrier did not even raise that issue directly in its brief.

In addition, the statement found in footnote 14:

> " . . . This appeal, because it was perfected after the effective date of the 1972 Amendments, should therefore be decided on the law most clearly applicable at that time."

seems squarely at odds with the First Circuit view in *Addison v. Bulk Food Carriers, Inc., supra,* which held that the parties' rights under the same 1972 amendments were fixed when the claimant was injured.

Wherefore, the premises considered, appellees respectfully oppose the awarding of attorney's fees against them as prayed for by the Intervenor.

/s/ John C. Duncan III
John C. Duncan III
1000 Connecticut Ave.
Washington, D.C. 20036
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 1974, a copy of the foregoing Opposition to Intervenor's Motion for Attorney's Fees was sent to Leavenworth Colby, Esq., Special Assistant to the Attorney General, U.S. Department of Justice, P.O. Box 121, Ben Franklin Station, Washington, D.C. 20044; George M. Lilly, Esq., Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20210; Maurice C. Goodpasture, Attorney for Intervenor, 1730 North Lynn Street, Arlington, Virginia 22209; and Jefferson de R. Capps, Attorney for Intervenor, 3446 Fifth Avenue North, St Petersburg, Florida 33713.

/s/ John C. Duncan, III
John C. Duncan, III
Attorney for Appellees

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 73-1569 September Term, 1973

Intercounty Construction Corp.,
Hartford Accident & Indemnity Co.,

v. Civil Action 297-72

Noah C.A. Walker, Deputy Commissioner
U.S. Department of Labor, Bureau of
Employees Compensation,
Appellants

Mary Jones,
Intervenor

Before: Leventhal and Robb, Circuit Judges, and,
*Solomon, United States District Judge for
the District of Oregon

ORDER

Intervenor (Mary Jones) has submitted a motion for attorney's fees and appellees have submitted an opposition thereto. It is

ORDERED by the Court that the Clerk is directed to file the aforesaid motion for attorney's fees and the opposition thereto, and, it is

*Sitting by designation pursuant to Title 28 U.S.C. §294(d)

FURTHER ORDERED by the Court that intervenor shall submit, within 14 days of the date of this order, a detailed statement of services rendered and the benefits obtained for the client.

For the Court:

Hugh E. Kline, Clerk

By:

/s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellees,

v.

NOAH C. A. WALTER, Deputy Commissioner,
U.S. DEPARTMENT OF LABOR,
Bureau of Employees Compensation,
Appellants.

INTERVENOR'S STATEMENT AS TO SERVICES TO CLAIMANT

Pursuant to the order of this Court dated 30 August 1974 for the Intervenor, MARY JONES, as guardian of the claimant, CHARLES E. JONES, incompetent, to submit a detailed statement of services rendered and benefit obtained for claimant, the following is submitted by counsel for Intervenor:

1. At Exhibit #1 is a detailed itemization of hours utilized toward the appeal herein.

2. As to the benefits obtained for the claimant, CHARLES E. JONES:

a. The District Court below by its order of summary judgment had enjoined from carrying into effect any part of the 8 February 1972 order of award of benefits by the Deputy Commissioner.

b. Intervenor's counsel knowing that he would have to be hospitalized for open-heart surgery coordinated with and secured the cooperation of the Department of Labor toward taking an appeal in this cause whereupon time would then be available for claimant to intervene. This was so accomplished.

c. The issue as to whether or not Section 22 of the Longshoremen's and Harborworkers' Act (33 U.S.C.A. 922) was a bar to claim of the claimant was resolved in favor of the claimant.

c. Despite appellee's protestations that the only issue it the appeal of this cause was c, above, the District Court by its summary judgment enojined the Deputy Commissioner "from carrying into effect any part" of the 8 February 1972 order and award of benefits to the claimant. This order directed the employer and insurance carrir to pay the reasonable cost of all medical treatment and hospital care as required by the injury of claimant, and to provide same in the future. In fact, the appellees, insurer-Hartford and employer-Intercounty suspended and stopped medical treatment and hsopital care being provided claimant. Then on this appeal, and appearance of the parties before the Court in argument appellees then

agreed to liability for medical treatment and hospital care for claimant.

e. Accordingly, as the cause now stands, and until and unless the District Court should rule contra, the liability of appellees for both compensation and medical treatment and hospital care to the claimant continues, the claimant continuing in incompetency, confined to a nursing home, and requiring said benefits.

I CERTIFY that a copy hereof has been provided to counsel of record by mail this 9th day of September, 1974, at:

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/s/ J. de R. Capps
JEFFERSON de R. CAPPS
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St. Petersburg, Florida 33713

DETAILED STATEMENT OF SERVICES PERFORMED

DATE	SERVICES PERFORMED	TIME UTILIZED *(In hours)*
1 Dec. 1972	Review of claimant's medical expenses requiring payment–letter to Hartford. Case was then on appeal by Hartford (and employer) to U.S. District Court.	1
	(In this following period notice received of claimant's medical care refused and compensation ceased; notice of summary judgment for Hartford. Based on the foregoing and above, coordination with Colby, Justice Dept., recourse was appeal)	
4 Mar. 1973	File review and telephone coordination wth Colby, Justice Department	¾
9 Mar. 1973	Telephone coordination with Guardian, Mary Jones and with Colby, Justice Department	½
22 Mar. 1973	Conference with Guardian, Mary Jones–no medical for claimant, telephone with Colby, Justice Dept.	¾
26 Mar. 1973	Letter to Lilly, Department of Labor–reasons for Dept. to appeal	1½
6 April 1973	Telephone coordination on appeal with Attorney for Guardian, Mary Jones, letter on appeal to associated counsel, Goodpasture	2¼
9 April 1973	Telephone calls from Colby, Justice Dept. and Goodpasture, Associated Counsel–Dept. of Labor will appeal	½
10 April 1973	Telephone coordination with Colby, Justice Dept. and Attorney for Guardian, Mary Jones on claimant intervention	¼

11 April 1973	Telephone coordination with Colby, Justice Department–intervention by claimant	¼
	Letter to Dr. Koenig on prior medical provided claimant–necessary for appeal; coordination with Attorney for Guardian, Mary Jones	1
	Speed letter to associated counsel, Goodpasture on intervention	¼
3 May 1973	Telephone coordination with Colby, Department of Justice–planning time appeal and intervention	¼
30 May 1973 and 31 May	Preparation of motion to intervene and letter to associated counsel, Goodpasture	2½
	(Claimant's counsel hospitalized for open-heart surgery and did not return to full-time practice until 31 July)	
27 July 1973	Telephone coordination with and letter to Colby, Justice Dept.–coordination motion for additional extension for time to file brief for Department as appellant and to cover intervenor–claimant.	1
	(The following time utilized in research of all cases and drafting of intervenor's brief to include drafts of brief being prepared by appellant by Colby, Dept. and provided to intervenor's counsel during the period)	
5 August 1973		2¼
6 August 1973		2½
7 August 1973		2
9 August 1973		5
10 August 1973		5¾
11 August 1973		8

12 August 1973		8¼
13 August 1973		7
14 August 1973		11¼
15 August 1973		5¼
16 August 1973		16¼
17 August 1973		12½
19 August 1973		4
20 August 1973		4½
21 August 1973		11½
	(The following time utilized in research of all cases in appellee's brief, and drafting reply brief for intervenor–claimant)	
4 October 1973		6½
6 October 1973		6
7 October 1973		3
8 October 1973		5
9 October 1973		5
10 October 1973		3½
11 October 1973		5¼
12 October 1973		7
13 October 1973		7
15 October 1973		½
	(The following time utilized in preparation for and coordination on oral argument, noting that the Court did not place the matter on the summary calendar until 29 March 1974)	
14 March 1974	Telephone coordination with office, Colby, Justice Dept., and Lilly, Dept. Labor	½
18 March 1974	Telephone coordination with Lilly, Dept. Labor	¼

25 March 1974	Telephone coordination with Lilly, Dept. Labor	¼
26 March 1974	Telephone coordination with Colby, Justice Department	¼
27 March 1974	Telephone coordination with Colby, Justice Department	¼
28 March 1974	Letter to attorney for guardian, Mary Jones, on oral argument	¼
6 & 7 April 1974	Review for oral argument	4
11 April 1974	Telephone from associated counsel, Goodpasture, case on summary calendar, advice to Guardian, Mary Jones	½
12 April 1974	Telephone coordination with Colby, Justice Department	¼
	Completion of review and letter to Colby, Justice Dept. with legal memo on oral argument	3
	TOTAL	177 hours

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * * * *

ORDER

On consideration of the motion of counsel for intervenor, Mary Jones, as guardian for the claimant, Charles E. Jones, incompetent, for attorney's fees, and of the responses with respect thereto, it is

ORDERED by the Court that attorney's fees to counsel for the aforesaid intervenor be awarded in the amount of $750.00.

Per Curiam

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

VIRGINIA HOTEL COMPANY	)	
and	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Petitioners	)	
v.	)	**BRB No. 133-73**
EVELYN MILLS	)	
Respondent	)	

DECISION OF THE BOARD

Appeal from Decision and Order and Supplemental Decision and Order of John A. Fenton, Administrative Law Judge, United States Department of Labor.

Russell E. Bond, Washington, D.C. (Macleay, Lynch, Bernhard & Gregg) for petitioners.

Philip J. Lesser, Washington, D.C. (Lesser & Lesser) for respondent.

Jean S. Cooper, Washington, D.C., United States Department of Labor (William J. Kilberg, Solicitor of Labor, James G. Johnston, Associate Solicitor of Labor) for the Director, Office of Workmen's Compensation Programs, United States Department of Labor.

Before: Albert, Chairman, Parkinson and Ray, Members.

Albert, Chairman:

This is an appeal by petitioners, Virginia Hotel Company, as employer, and Liberty Mutual Insurance Company, its insurance carrier, seeking reversal of a compensation order and of a supplemental order entered respectively on October 16, 1973, and on November 13, 1973, by the administrative law judge, in which he awarded Evelyn Mills, the employee respondent, temporary total disability benefits. The cause arises upon a petition to review and set aside as not in accordance with law nor supported by substantial evidence these orders filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the Act), 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*. as made applicable to the District of Columbia, 45 Stat. 600, D.C. Code 36-501.

In his order of October 16, 1973, the administrative law judge found that due to a back injury arising out of and in the course of her employment with the employer, the claimant became temporarily totally disabled from December 12, 1970, to date. The employer was ordered to pay interest at the rate of 6% per year on accrued benefits insofar as they exceeded voluntary payments. An attorney's fee of $1000 was approved for the claimant's attorney, such fee to be made a lien upon and paid out of the compensation award. On November 13, 1973, the judge entered a supplemental order modifying the award of attorney's fees so as to charge to the employer/carrier that portion of the fees earned after the November 26, 1972, effective date of the amendment of Section 28 of the Act.

The Petitioners contend on appeal that the findings of the administrative law judge are not supported by substantial evidence, that the assessment of interest was contrary

to law, and that the assessment of that portion of the attorney's fees earned after the amendments against the employer and carrier is not in accordance with law.

At the outset the Board hereby dismisses the administrative law judge as not being a proper party as so named in the petitioners' appeal. When an officer of the United States Department of Labor is to be named as a respondent in an appeal before the Board, the proper party in interest is the Director, Office of Workmen's Compensation Programs, United States Department of Labor. *Suburban Glass Co.* and *Aetna Casualty & Surety Co. v. Leonard L. Wood*, BRB No. 130-73 (March 7, 1974).

With regard to the findings of fact by the administrative law judge, the Board's scope of review is limited to determining whether or not the decision under review is supported by substantial evidence in the record considered as a whole. Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). The petitioners specifically contend that the record does not support a finding of temporary total disability, nor a finding that such disability, if any, is causally related to the employment.

The facts are summarized as follows. The claimant sustained an injury to her back on December 11, 1970, during the course of her employment with the employer as a charwoman, when she attempted to lift a heavy trash basket. Prior to her injury the claimant had not lost any time from work. X-rays taken the day following the injury indicated, as variously interpreted by several physicians, a narrowing of the L5-S1 interspace, sclerosis of the fifth lumbar vertebra, a marked degeneration of the lumbosocral interspace, and a longstanding degenerative disc. A myelogram showed a filling defect at L4-L5. The claimant testified that since her injury she has been unable to engage

in gainful employment because of severe pain, inability to bend or lift, and inability to walk or stand for any length of time.

Dr. John C. LaRosa testified that the claimant has been his patient since October 1970, at which time she came in for treatment of hypertension and anxiety. There were no back complaints when he first saw her, but when he examined her in February 1971 (approximately two mon months after the injury) he found severe muscle spasms in her lower back. During all of the approximately fifteen times he has seen the claimant since February 1971, she has had muscle spasms and has never been free from pain. Based on his observations of her over a period of several years, Dr. LaRosa believes that the claimant suffers pain of a nature and extent so as to disable her from her work as a charwoman. She has difficulty in walking, moving, bending, and rising from a sitting to standing position. Dr. LaRosa is not sure whether the claimant's current pain is the result of organic or emotional factors, but is sure that "she does suffer from crippling back pain, and that whatever its current etiology it seems clearly related to an acute injury in December 1970. . . ."

Dr. Martin Giller, a psychiatrist, has seen the claimant approximately 150 times since April 26, 1971. Her initial complaints were anxiety and depression, and back pain. The claimant indicated that she had become more anxious and depressed since the December 1970 injury. Dr. Giller is of the opinion that the claimant has a personality disorder with superimposed anxiety and depression which were exacerbated by the December 1970 occurrence. He noted that he had never seen the claimant walk without difficulty, and summarily rejected the possibility that she was malingering or lying about her pain. He believes that

the physical disability caused by the claimant's pain, coupled with her anxiety and depression, render her totally disabled.

Dr. Leon Yochelson, although testifying that the claimant would have been in her present emotional state and would have exhibited the same symptoms had the injury never occurred, nevertheless admitted that the degenerative disc could be responsible for her pain, and also admitted the possibility that pain triggered by the December 1970 incident could be aggravated or intensified by her anxiety and depression. Dr. Yochelson never dolbuted that the claimant actually felt the pain, and did not feel that she was malingering.

The treating orthopedic specialist, Dr. Henry L. Feffer, testified that the December 1970 incident resulted in a sprain of a degenerative disc, and further, that iit is possible that a sprain trauma can aggravate a disc condition. Dr. Feller felt that the claimant's pain had levellled off to a point consistent with a chronic degenerative dlisc, and rated her at a 20% permanent partial disability, but conceded that this was only a "ball park" figure att best and refers to pure physical disability, not to earning; capacity. He started that the claimant had real emotional problems, and dismissed any question of malingering.

Based on the foregoing, the Board finds that there is substantial evidence in the record considered as a whole to support the findings of the administrative law judge, that the December 1970 accident caused a spraiin of a preexisting degenerated intevertebral disc and greatly aggravated the claimant's condition of anxiety and depressiion; that these emotional problems, operating in conjunctiion with the residual effects of the disc injury, caused the claimant almost constant pain and rendered her unable to walk or

stand for any sustained period of time, or to bend or lift without considerable pain; and that the claimant is therefore disabled from engaging in her former employment or any comparable employment.

The petitioners in their brief concede that the record shows a claimant with a long-term painful lower back problem possibly exacerbated by psychological problems.

The law is well settled that an aggravation of a pre-existing condition is compensable under the Act. *Wheatley v. Adler,* 407 F.2d 307, 312 (D.C. Cir. 1968); *John McShain, Inc. and Aetna Casualty & Surety Co. v. Noah C.A. Walter and Philip Graves,* BRB No. 113-73 (September 11, 1973). The fact that a large component of the claimant's disability may be phychological rather than physical does not defeat her claim where the physical and psychological infirmities at least interact to cause disability *See Urban Land Institute v. Garrell,* 346 F. Supp. 699 (D.D.C. 1972).

Since disability under the Act is an economic concept based on a medical foundation, the finding based on substantial evidence that the claimant is totally disabled due to her inability to engage in her former employment or any comparable employment, must stand. *Quick v. Martin,* 397 F.2d 644, 648 (D.C. Cir. 1968); *Perini Corp. v. Hyede,* 306 F. Supp. 1321, 1325 (D.R.I. 1969); *Suderman Stevedores, Inc. and Texas Employers' Insurance Assoc. v. Seab Sanders,* BRB No. 122-73 (December 28, 1973). The burden is on the employer to establish that an employee injured in the course of his or her employment, who proves disability from his or her regular employment, has actual opportunities to obtain other work. *Perini v. Heyde, supra* 1325-26. Absent such proof by the employer in the instant case, the finding of temporary total disability is

supported by substantial evidence and is otherwise in accordance with law.

The petitioner's second contention on appeal is that the administrative law judge's assessment of interest on accrued benefits (insofar as they exceed voluntary payments) at the rate of 6% per year computed from the date each payment was orginally due, is not in accordance with law. Their argument is that since they voluntarily and in good faith paid the claimant compensation for 20% permanent partial disability based on a doctor's estimate of disability, assessment of interest is in effect an unwarranted penalty not provided for the Act. Although the Act is silent on the payment of such interest, case law, including pronouncements of this Board, has authorized such payment. The allowance of interest effectuates the policies on the Act by making the employee whole, by paying to the claimant lawful interest on money she would have had the use of had the petitioners not controverted her right to compensation for total disability. *Strachan Shipping Co. v. Wedemyer,* 452 F.2d 1225 (5th Cir. 1971), *cert. denied,* 406 U.S. 958 (1972); *Humble Oil and Refining Co. v. Philip A. Taliaferro and Glenn L. Menear,* BRB No. 107-73 (June 1, 1973).

The petitioners' final contention on appeal is that the Supplemental Decision and Order assessing them for that portion of the claimant's attorney's fees earned subsequent to the effective date of the 1972 amendments to the Act, is not in accordance with law. Although the original Decision and Order made the entire fee a lien upon the compensation award pursuant to pre-amendment Section 28, 33 U.S.C. 928, the judge modified his award of attorney's fees in accordance with his interpretation of the amend-

of Section 28 effective November 26, 1972. As amended, that section directs in substance that a successful claimant's attorney's fee is to be assessed against the employer or carrier. The petitioners argue that since the cause of action arose prior to the amendments, the apportionment of fees was an unconstitutional retroactive application of the amended statute. This Board has already held otherwise. *Suderman Stevedores, Inc. and Texas Employers' Insurance Assoc. v. Seab Sanders, supra; see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The mere fact that a statute applies retrospectively does not render it unconstitutional. *Cohen, supra* at 554. Given the well-established view that the Act is humanitarian in nature and should be construed liberally to effectuate its purposes, *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952), the Board finds that the apportionment of attorney's fees in the instant case was proper since it served to prevent a decrease in the disability benefits actually due the claimant.

Pursuant to the provisions of Section 28 of the Act, 33 U.S.C. 928, the Board hereby awards to the claimant's attorney the sum of $500 as a reasonable fee in consideration of his preparation and presentation of the case before the Board, such fee to be paid by the employer or carrier directly and in a lump sum to the claimant's attorney.

The decisions and orders appealed from are in accordance with law and are supported by substantial evidence, and are hereby affirmed.

/s/ Alfred G. Albert, Chairman
Alfred G. Albert

We concur:

/s/ E. West Parkinson, Member
E. West Parkinson

/s/ Jester S. Ray, Member
Jester S. Ray

Dated in Washington, D.C.
this 2nd of April 1974

SERVICE SHEET

BRB 133-73

Virginia Hotel Co. & Liberty Mutual Ins. Co.
v. Evelyn Mills

Copy of the Decision furnished to the following:

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MAR 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Counsel for Respondent, MARY JONES

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IN THE

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OCTOBER TERM, 1974

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INTERCOUNTY CONSTRUCTION CORP., and
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Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, Mary Jones, as guardian of the incompetent claimant, Charles E. Jones, files this brief in opposition to the petition of Intercounty Construction Corp. and Hartford Accident & Indemnity Company praying for a Writ of Certiorari to be issued for the review of the order for

attorney's fees to Respondent's attorney pursuant to the judgment entered in the United States Court of Appeals for the District of Columbia entered on January 16, 1975.

Respondent adopts Petitioners' statement of the opinions below, jurisdiction, questions presented, statutes and provisions of the United States Constitution involved, with reference to the Longshoremen's and Harbor Workers' Compensation Act merely being by section number and reference to the "Act," and statement of the case.

REASONS FOR NOT GRANTING THE WRIT

There is no need for the Court to exercise its discretion to issue its Writ of Certiorari to review the issue of attorney's fees, and this because the specific reasons cited by Petitioners as to why the Writ should issue are misplaced.

I. TO RESOLVE CONFLICT BETWEEN FEDERAL COURT OF APPEALS AND APPLICABLE DECISIONS OF SUPREME COURT AS APPLIED BY NUMEROUS STATE COURTS OF APPEALS AND LOWER FEDERAL COURT.

As to all of the cases cited by Petitioners, with the exception of *Hardware Mut. Casualty Co. v. Carlton,* 151 Fla. 238, 9 So.2d 359 (1942), there is no conflict in the application of Supreme Court and Federal Court decisions as applied by state and federal courts on the issue, that is, the granting of attorney's fees under a statutory amendment where the cause of action arose prior to the amendment. The *Carlton* case is the only case cited by Petitioners on the issue; analysis of the remainder of the cases shows that they are not on point.

First, as to the Florida Supreme Court decisions: The *Carlton* case, *supra,* stated that the parties' acceptance of Florida's Workmen's Compensation Act constituted a contract embracing the provisions of the act then in effect on the date of injury. This is a statement of the general rule (but a minority view as to attorney's fees not being allowable). Reliance by the Florida Court on *Liberato v. Royer,* 270 U.S. 535 (1926), was proper as to the act creating vested contract rights as of the date of injury. The additional Florida Supreme Court cases had nothing to do with the attorney fee point in issue here. Both *Phillips v. City of West Palm Beach,* 70 So.2d 345 (Fla.S.Ct. 1954), and *Hyatt v. Armstrong Cork Co.,* 121 So.2d 793 (Fla.S.Ct. 1960), had as an issue whether increased compensation under an amendment to the act could be retroactively applied to an injury before the amendment. *Hecht v. Parkinson,* 70 So.2d 505 (Fla.S.Ct. 1954), was as to the same point as in the *Phillips* and *Hyatt* cases, but was in specific reference to a scheduled injury. All, *Phillips, Hyatt* and *Hecht* held to the general rule that the act was a contract vesting rights and liabilities as to compensation as of the date of injury. All of the other cases cited by Petitioners as a conflict are not in conflict as to the point of attorney's fees, but rather are in support of the general rule as to the vested contract rights and liabilities to compensation as in the *Phillips, Hyatt* and *Hecht* cases.

What then of *Carlton, supra?* The issue is whether the matter of attorney's fees is determined to be a remedial, procedural or curative statutory provision, or whether it is determined to be substantive. The *Carlton* case, *supra,* is the only case cited by Petitioners that such an amendment is as to a substantive right. Actually, the Florida Supreme Court's determination is the minority view that such an amendment impairs vested contract rights. See *Penrose v. Commercial Travelers Insurance Co.,* 275 P.2d 969, 976-978 (Id. S.Ct.

1954), where, though the majority adhered to the minority view as in *Carlton, supra,* the majority and minority views on the point in issue here are discussed and citations provided. Under the majority view, application of a statutory amendment allowing attorney's fees to a cause of action occurring prior to the amendment is held to be constitutional, and retrospective in its application, as the change is determined to be remedial and to affect procedure, not vested contract rights. For statements of this general rule, see 20 Am.Jur. 2d, *Costs* §7; 20 C.J.S., *Costs* §3b; and, 99 C.J.S., *Workmen's Compensation* §21, page 130n.97.

There is no showing that the federal courts are in conflict in applying the 1972 amendment to the Act authorizing attorney's fees as to a claim arising prior to the amendment. See *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291 (2d Cir. 1974), and *Dillingham Corporation v. Massey,* 505 F.2d 1126 (9th Cir. 1974), and supporting authorities for basis and reasoning, *Sampeyreac v. United States,* 32 U.S.(7 Pet.)222, 238 (1833), *Ahmed's Case,* 278 Mass. 180, 179 N.E. 684 (1932); cf. *Bradley v. Richmond School Board,* __U.S.__, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Indeed, there is also no showing that there is any conflict as to the precise issue as to any decisions of the Benefits Review Board under the 1972 amendment to the Act.

II. TO INSURE PROPER ADMINISTRATION OF LONGSHOREMEN'S ACT.

Petitioners suggest that the *Overseas* and *Dillingham* cases, *supra,* are distinguishable in that the constitutional issues were not directly raised, or because any pronouncement thereon could be construed as *dicta.* In *Overseas,* at 500 F.2d 1291, 1297, the court stated:

> "... The only serious dispute involving §928(a) is whether, as a statutory matter, Congress intended that section to apply to cases pending in any forum on November 26, 1972 (the effective date of the amendments), and, if so, whether there be any constitutional impediment to such an application. These questions need not detain us long...."

The court then, on the constitutional issue, went on to endorse the decision of the Benefits Review Board in *Virginia Hotel Co. v. Mills*, BRB No. 133-73 (Ben. Rev. Bd. Apr. 2, 1974) (Petitioners' Petition, App. 54-63), that the granting of attorney's fees under the amendment to the Act was not unconstitutional. The court in so holding relied on *Sampeyreac, supra,* for the proposition that a legislative act could be retrospectively applied to a cause of action that existed prior to the effective date of the act; and, on *Ahmed's Case, supra,* for the propositions that the statutory assessment of attorney's fees as costs to the successful claimant, but not to the employer/insurance carrier, was not unconstitutional because applied to pending and future cases, was not a deprivation of equal protection of the laws, nor a deprivation of property without due process of law. Comparison was made to the Supreme Court case of *Bradley, supra,* for the proposition that attorney's fees could be awarded for services performed as to a pending cause before the authorizing act in question had been enacted. Reference was then made to A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §83.12, 83.17(1973), as to approaches in providing attorney's fees in workmen compensation cases, and as to the commission or court supervision of the award of attorney's fees. Particular note should be made of the recommendation of the Council of State Governments recommended draft provision for attorney's fees appearing in §83.17, pages 354.61-354.62–the 1972 amendment to §928 of the Act here in question will be seen to be similar to the recommendation. Suffice it to say, the consideration of constitutional issues was more than *dictum.*

Petitioners state there are many pending cases prior to the 1972 amendment to the Act as to which attorney's fees may be awarded. This is as it should be and is not an unconstitutional application of the amendment as already shown—this is the intent and purpose of remedial and procedural legislation. But Petitioners say, cases previously considered as closed could be revived, and then the question of attorney's fees presented here would occur. Petitioners are crying, "Wolf"—there is no showing that this is occurring or has occurred. But, if it should occur, there is good authority that an amendment cannot apply to a workmen's compensation claim that is in fact closed, the right to review and appeal having expired. See *Casieri's Case*, 190 N.E.118 (Mass. Sup. Jud. Ct. 1934), for a case in point, and *Claridge Apartments Company v. Commissioner of Internal Revenue*, 323 U.S. 141, 164-165 (1944), and *Greene v. United States*, 376 U.S. 149, 160 (1964), for the propositions that legislative amendments are not to apply to issues closed and not pending, and that a retroactive effect will not be given to legislation that interferes with antecedent rights unless this is the unequivocable and manifest intent of the legislature.

III. TO DECIDE AN IMPORTANT FEDERAL QUESTION.

Petitioners' point here is a re-argument of their Reason I. There is nothing to show that the 1972 amendment to the Act is not being properly administered, and the Supreme Court cases of *Claridge* and *Greene, supra,* are not in point. *Claridge* stands for the proposition that a legislative act is not to apply to an issue closed and not pending (application is permissible if the issue is pending). *Greene* stands for the proposition that a retroactive effect will not be given to legislation that interferes with antecedent rights. The proscription in *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974), has nothing to do with the application of a

statutory amendment for attorney's fees to pending causes– this case stands for the proposition that the statutes at the time of injury governed as to the statutory causes of action then allowed, and that the amendment of the Longshoremen's and Harbor Workers' Act subsequent to the injury would not be allowed to interfere with the rights and liabilities of these causes of action as existed on the date of the injury. *Bell v. Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla. 1973), is to the same effect as *Addison.* Neither case is on point as to the remedial and procedural status of the award of attorney's fees. Neither is Petitioners' reference to the House of Representatives Report No. 92-1441, 92d Cong. 2d Sess. (1972) (118 Cong. Rec. 4698-4699 (1972)), on point as to the purpose and background of the 1972 amendment to the Act. It is on point to see that the Committee on Education and Labor, in stating its purpose and background, and in its description of the amendment to allow attorney's fees, did not proscribe its retroactive application. 3 U.S. Code Cong. & Adm. News '72, 4706 & 4747.

On the point in issue and in fact, the Federal Courts are applying to 1972 amendment to the Act properly, see the *Overseas* and *Dillingham* cases, *supra.* This is pursuant to established federal law. See *Stancil v. United States,* 200 F. Supp. 36 (E.D. Va. 1961), where claimant's pending suit was commenced under the Federal Tort Claims Act prior to amendment of the Virginia Workmen's Compensation Act, claimant's attorney was entitled to a pro-rata attorney's fee for recovery of the carrier's subrogated portion of the recovery though the amendment was subsequent to suit being brought, and prior to the amendment claimant's attorney was not entitled to a pro-rata attorney's fee. *Stancil,* at 200 F.2d 36, 45-46, has a discussion of the majority view, and the minority view of the Florida Supreme Court *Carlton* case, *supra,* in the retroactive application of attorney's fees to

pending causes. In discussion of the majority view, the court enunciates the distinction to be made between substantive rights, and matters of remedy and procedure here, see *Stancil*, page 46:

> "While the 'right' to institute an action against a third party may accrue to the employer as of the date of the injury, the method and manner of obtaining such recovery constitutes only a procedural right, or at best, a right affecting merely a form of remedy. For these reasons the 1960 amendment manifestly touched upon the rights of the carrier as to all cases pending when the amendment became effective. . . . "

This the distinction drawn in *Ettor v. City of Tacoma*, 228 U.S. 148, 154-155 (1913): statutes as to remedy relate to the course and mode of procedure to enforce a substantive right and are subject to change, alteration and repeal so long as a contract is not impaired or a vested property right is not deprived; in *Sampeyreac, supra*, at 32 U.S. (7 Pet.) 222, 239: legislation providing a remedy only has retrospective operation though, indeed, it may affect and operate upon causes of action existing at the time it is passed; and, in *Bell, supra*, at 363 F.Supp. 156, 159: due to sometimes harsh effect of retroactivity, statutes affecting substantial rights are invariably given prospective application, laws relating to procedure are given more liberal court interpretation and are sometimes applied retroactively, and a distinction is drawn between "curative" statutes which by their design are necessarily retroactive in application, and "amendatory" acts which create or abrogate claims for relief or substantive rights and are usually afforded prospective application.

It is submitted that Petitioners' authorities are not correct for the proposition that, as to attorney's fees, the right thereto can only vest as to claims arising subsequent to the 1972 amendment of the Act. The 1972 amendment as to

attorney's fees is being constitutionally applied, and there is no need for this Court to exercise its discretion to endorse this salutary application.

CONCLUSION

For the reasons set forth, it is respectfully suggested that the petition for Writ of Certiorari as to this issue should not be granted.

Dated: 10 March 1975.

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Attorney for Respondent, MARY JONES

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEES' COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1975, and the petition for a writ of certiorari was filed on February 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1972 amendment to Section 28 of the Longshoremen's and Harbor Workers' Compensation Act, making employers liable for successful claimants' attorneys' fees, was properly applied to legal services rendered after its effective date in a case arising out of injuries incurred prior to its effective date.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are set out at Pet. 2-7.

STATEMENT

This case involves a decision by the court of appeals that counsel for respondent Jones should receive legal fees for services rendered in that court in the course of an appeal. The merits of the underlying controversy are before this Court in No. 74-362, certiorari granted, January 20, 1975.

We rely here on the statement of facts contained in our brief on the merits in No. 74-362. Briefly, in 1972 Charles Jones was awarded compensation for a totally disabling injury he had suffered while employed in 1960 by petitioner Intercounty. Intercounty and its insurer, Hartford Accident & Indemnity Company, requested injunctive relief against the Deputy Commissioner's compensation order on the ground that Jones had not sought relief within the time provided by Section 22 of the Act. The district court agreed with petitioners' construction of the Act, but the court of appeals, on July 3, 1974, reversed and reinstated the Deputy Commissioner's order (Pet. App. 1-13).

Thereafter, on August 14, 1974, counsel for respondent Mary Jones (the guardian of Charles Jones) requested the court of appeals to award him a fee of $3,000 for his services in representing the claimant on and after December 1, 1972, to be assessed against Intercounty and Hartford pursuant to Section 28 of the Longshoremen's Act, 33 U.S.C. (Supp. II) 928.

Prior to the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, 33 U.S.C. (Supp. II) 901, *et seq.*, the attorney's fee approved by a deputy commissioner or court for a successful claimant's attorney was paid out of the compensation awarded. Section 28(a), 33 U.S.C. 928(a). The 1972 Amendments took effect while this case was pending in the district court. As amended, Section 28 provides that a successful claimant's attorney's fees are set by the tribunal before which the legal services are rendered and that the employer or insurer who erroneously has controverted the claimant's entitlement to compensation, thereby necessitating the attorney's services, is liable for the full amount of the fees.[1] On January 16, 1975, the court of appeals granted a fee in the amount of $750.00 (Pet. App. 53).[2]

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[1]Section 26 of the Act previously had imposed liability for such fees on an employer or insurer that brought court proceedings under the Act "without reasonable ground." See *Overseas African Construction Corp.* v. *McMullen*, 500 F.2d 1291, 1296-1297 (C.A. 2). Under Section 28 as amended, however, the employer's reasonableness in opposing the claim is irrelevant.

[2]A fee had been allowed the attorney by the Deputy Commissioner, in his order of February 8, 1972, for his services to that date. Pursuant to Section 28 (33 U.S.C. 928), the fee, in the amount of $3,500, was to be paid out of the compensation awarded. Respondents have not claimed that the 1972 amendments transfer this liability to petitioners.

Jones' counsel did not appear in the district court proceedings. Although a small portion of his claim for an award of $3,000 was based on services rendered while the case was pending in the district court (see Pet. App. 49-52), the court of appeals' award of $750 (Pet. App. 53) was, as petitioners state (Pet. 9), presumably based on services rendered while the case was before that court.

ARGUMENT

The court below held that attorney's fees for services rendered after the effective date of the amendments should be paid by the employer or its insurer. Accord, *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1297-1298 (C.A. 2); *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1129 (C.A. 9); *Matthews* v. *Walter, C.A. D.C.,* No. 73-2152, decided March 10, 1975. There is no conflict among the circuits,[3] and the decision is supported by the principle of *Bradley* v. *Richmond School Board,* 416 U.S. 696. Accordingly, there is no reason for review by this Court.

1. Petitioners contend that the amendment to Section 28 produces a forbidden "retroactive" increase in the amount of benefits paid on account of injuries that antedated the amendments. This is an inaccurate characterization, and the application of the amendment to this case does not produce a "retroactive" result.

No fee has been sought by the claimant's attorney, nor has any been awarded, for legal services rendered prior to November 26, 1972, the effective date of the amendments. The amendments have not increased petitioners' liability for legal services rendered prior to that date.

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[3]The Benefits Review Board established by the 1972 amendments (33 U.S.C. (Supp. II) 921(b)) consistently has ruled that legal services rendered after the effective date of the amendments should be compensated in accordance with the amended Section 28. See, *e.g., Humble Oil & Refining Co.* v. *Taliaferro,* BRB No. 107-73 at 7 (June 1, 1973); *Suderman Stevedores, Inc.* v. *Sanders,* BRB No. 122-73 at 6-8 (December 28, 1973); *Nardella* v. *Campbell Machine, Inc.,* BRB No. 131-73 at 11-15 (February 22, 1974); *Virginia Hotel Co.* v. *Mills,* BRB No. 133-73 at 9-10 (April 2, 1974); *Director, Office of Workers' Compensation Programs* v. *Gibbs Corporation,* BRB No. 74-104 (July 23, 1974); *Carpenter* v. *Potomac Iron Works, Inc.,* BRB No. 74-208 (February 28, 1975).

The liability for fees for legal services, wherever it is to lie, does not arise until the services have been performed. Here the final events giving rise to petitioners' liability occurred while the amended section was in effect.[4] The liability for fees obviously did not become fixed at the time of the injury, since petitioners could thereafter have avoided any liability for legal fees by acting in such a manner that claimants with valid claims were not forced to incur legal expenses in order to receive the compensation due them. Because the award here covers only legal expenses incurred after the effective date of the amendments, the amendments, as applied to this case, have operated completely prospectively.

2. Even if the imposition of legal fees upon petitioners could be characterized as "retroactive," however, in the sense that fees had been assessed for services rendered before the effective date of the amendments, the decision below would be supported by *Bradley* v. *Richmond School Board, supra. Bradley* held that, under the Emergency School Aid Act, a court of appeals properly could impose attorneys' fees for services rendered prior to the effective date of the Act, because there is a "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Id.* at 711.

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[4]The cases relied upon by petitioners deal with substantial increases in compensation benefits to be paid on account of prior injuries. These cases are inapposite because in them the event—the injury—that finally fixed liability antedated the change in the compensation provisions. Moreover, only one of the state cases cited by petitioners deals with attorneys' fees, and all of the state cases involve compensation laws characterized by the state courts as "contractual" in nature. Consequently, a change in payment schedules under such laws might alter a "contract." The Longshoremen's and Harbor Workers' Act is not a "contractual" workers' compensation statute; the employer and employee cannot elect or refuse coverage or alter its terms in any particular.

In any event, the award here was not "retroactive" in that sense. There certainly is no "manifest injustice" in requiring petitioners to pay, according to the terms of Section 28, for legal services rendered after the effective date of the amendments, and the liability for which could have been avoided by declining to resist meritorious claims for compensation.[5] Nor is there either statutory direction or legislative history indicating that the amended Section 28 is inapplicable to cases of this sort. Therefore, under *Bradley*, no other course was open to the court below.

3. Petitioners assert that the decision below conflicts with *Addison* v. *Bulk Food Carriers, Inc.*, 489 F. 2d 1041 (C.A. 1), and *Bell* v. *Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla.), which, petitioners assert, held that the date of an employee's injury is the critical date for "vesting" of rights and responsibilities (Pet. 16-17). This is inaccurate. These two cases concerned only the application of Section 18(a) of the Amendments, 86 Stat. 1263, amending Section 5 of the Act, 33 U.S.C. (Supp. II) 905.

In the amended Section 5 Congress abrogated the judicial cause of action formerly available to longshoremen for injuries resulting from the "unseaworthiness" of the vessel in whose service they were working. Congress also abolished the vessel's action for indemnity against the stevedore based on breach of a "warranty of workmanlike performance" of the stevedoring contract. See S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-12; H. Rep. No. 92-1441, 92d Cong., 2d Sess. 4-8. The courts found a congressional intent that available admiralty remedies with respect to injuries incurred prior to the amendment

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[5]No provision for attorney's fees is made unless the claimant prevails.

remain unaffected, because the last event fixing liability had occurred prior to the amendments. 118 Cong. Rec. 36382, 36384. But this intent related only to the amendments' abrogation of unseaworthiness and workmanlike performance suits; it provides no basis for assuming that Congress also intended that liability for subsequently incurred legal expenses is to be determined by the law in effect on the date of the injury. *Addison* and *Bell* do not bear on the amendment to Section 28.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1975.